But the police officer did *not* then search the trunk. He decided instead to seek additional probable cause by calling the canine unit to conduct a dog sniff. (App. 20-26.)

Robert Griffin is an African American male who was driving along a highway (I-94) that the state police had targeted as a highway on which drugs are transported from Chicago to Michigan. (App. 36.) Griffin waited to find out if he was actually being taken to the station on the charge of driving on a suspended license. (App. 23-29.) The officer investigated further. *Id.*

Trooper Coleman testified at the preliminary examination that he had various reasons to be suspicious of Griffin. (App. 20-44.) The officer cited to the fact that Griffin had in his possession a cell phone, pager, address book and air fresheners in his vehicle at the time of the stop. (App. 26-27, 29-30.) This caused the police officer to search the interior of the vehicle *after* Griffin was taken out of his car and put in handcuffs. (App. 26, 59.) The police officer did not then decide to take Griffin to the station since he said he wanted to have more probable cause to search the trunk of the vehicle. (App. 25, 30.) So Trooper Coleman called to have a canine unit sent. (App. 30.) This call was placed 25 to 30 minutes after the initial call to dispatch (which was 10 minutes after the initial stop). (App. 31.) As a result, the canine unit was only called about 40 minutes after the initial stop. (App. 29-39.) Some time later, the canine unit arrived and the dog sniffed the car (App. 29), and found drugs in the trunk. (App. 25-32.)

Based on the foregoing, it is clear from this record that the dog sniff was conducted close to an hour *or more after* the initial traffic stop. (App. 25-32.) Trooper Coleman never offered before or at trial any record to show that Robert Griffin's driver's license had been suspended for a period of time that extended to the time of the stop and arrest. (App. 20-29).

The State Police records were not offered at the trial and no proof was given to show that Mr. Griffin had a Michigan license that was suspended at the time of the arrest. (App. 20-29; Trial Transcript ("TT."), Vol. I, 11-15-98, pp. 120-163.)

No proof was offered at trial or before to show that Griffin had obtained an Illinois license illegally. *Id.* The Prosecutor also did not seek to prove at trial that Griffin's Michigan Driver's license had been suspended for any other reason than Griffin's failure to pay a fee to renew or reinstate it. *Id.* No proof was offered to show that Griffin had any duty to renew his Michigan driver's license. *Id.* The State Trooper still relied on his claim of driving on a suspended license at and before trial. *Id.*

The dog alerted to the presence of a narcotic in the trunk. (App. 25-33.) The police then found 500 grams of cocaine in baggies in the trunk of the car. *Id.* The drugs were found along with the clothes and personal belongings of Mr. Griffin's cousin, Glenn Evans, who is the son of the aunt from whom Griffin had borrowed the car. (TT., 11-5-98, pp. 225-237.) The drugs in the trunk were hidden in a shopping bag by the left wheel well which was tied shut – so that Griffin would not have seen the drugs, even if he had looked in the trunk. (App. 85.) There were no fingerprints on the bag with the drugs linking Griffin to the drugs, or any other evidence showing Griffin had put the drugs in the trunk, except that he was driving the car. *Id.* Glenn Evans (Griffin's cousin, the son of his aunt, who owned the car) was called to testify at trial about whether or not the drugs in the trunk belonged to him. (TT., 11-5-98, pp. 225-237.) Evans said that all the items in the trunk were his. (*Id.*, p., 196.) In response to the question about whether the drugs in the bag in the trunk belonged to him as well, Mr. Evans claimed the Fifth Amendment privilege to remain silent so as to not incriminate himself. (*Id.*, p. 198.) This left the Petitioner to defend at trial against the supposition that, since he was driving the vehicle at the time, the drugs in the trunk must have belonged to him *or* he must have known they were there. The State rested essentially on the theory that he who drives the vehicle must have constructive possession and knowledge of drugs in the trunk.[1]

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[1] Petitioner Griffin's defense was that he was a "blind mule." A "blind mule" is a person who drives a car in which drugs have been placed in the car by others without the driver's knowledge. The person driving the car

(Continued on following page)

Petitioner Robert Griffin was convicted of cocaine possession with intent to deliver cocaine, 2nd offense, in an amount greater than 225 grams, but less than 650 grams. (App. 1.) He was sentenced to serve 30-60 years in prison (i.e., most of the rest of his natural life). *Id.* Griffin's defense at trial was that he had no knowledge of the drugs in the trunk and had not taken possession of them at any time. (TT., 11-5-98, pp. 225-237.) The Prosecutor relied on testimony of the officer that because Griffin had a cell phone, pager and address book, and given his responses at the scene, he must be a drug courier. (TT., 11-5-98, pp. 217-225.) Griffin challenged admission of the drug courier profile evidence at his trial on appeal. (*Id.*; App. 54-72.) The Michigan Courts denied Griffin's appeal. (App. 7-14.)

Petitioner filed a timely post-conviction motion alleging his original defense attorney failed to raise a Fourth Amendment claim of unlawful search and seizure of the drugs in the trunk. (App. 73-92.) The post-conviction motion alleged, among other claims, that Griffin's trial attorney, who also represented him in the direct appeal to the Michigan Court of Appeals, had rendered ineffective assistance. *Id.* Petitioner's original defense counsel had challenged the seizure of the evidence on Fourth Amendment grounds by filing a motion to suppress in the Berrien County Circuit Court. (App. 16-17.) Petitioner's original defense attorney then obtained a ruling from the trial court denying his motion to suppress. (App. 48-53.)

At trial, Griffin's original defense attorney decided to stipulate that the search was legal in order to try to get a stipulation or ruling excluding testimony from the State Trooper seeking to link Mr. Griffin to the drugs in the trunk.

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then unwittingly takes the drugs to the place where they are going, and once the car arrives in another city, someone with knowledge of the drugs in the trunk takes them out of the car (i.e., without the driver's knowledge). *See, e.g., People v. Schepis*, 206 A.D.2d 278, 614 N.Y.S.2d 719 (1994) (discussing use of "blind mules" to deliver drugs). *See generally*, "Article: The Drug Courier Profile: In Planes, Trains, and Automobiles, And Now In the Jury Box," 46 Am. U. L. Rev. 747, n.91 (1997).

(App. 70.) This stipulation by Griffin's counsel was futile *since* the trial court admitted the drug courier profile testimony of State Trooper Coleman anyway. (App. 70; TT., 11-5-98, pp. 120-160.)

After the trial, Griffin's original defense counsel did not raise the Fourth Amendment claim of unlawful search and seizure of the drugs in the trunk in his first direct appeal to the Michigan Court of Appeals. (App. 54-72.) Defense counsel also did not argue in the Michigan Court of Appeals that Griffin's alleged arrest and detention in handcuffs at the scene long before the canine unit arrived was unlawful – i.e., since the police officer had presented no valid proof that Griffin was driving on a suspended license. (*Id.*) His defense counsel did *not* raise on appeal that the mere use of a cell phone, pager and air fresheners was not sufficient cause to justify a search of the trunk, even when viewed in combination with Griffin's answers to the police officer. (*Id.*) (Griffin had told the officer he did not have a prior criminal record when, in fact, he was on parole for a first offense that was related to drugs.) (App. 28.) In addition, Griffin's attorney failed to argue that a driver in a routine traffic stop has no duty to answer questions from the police officer about his prior criminal record when he is stopped only for speeding. (App. 54-72.) *In summary*, the record shows that, even though Griffin's defense counsel had understood the search of the trunk may have violated the Fourth Amendment, and had filed a motion to suppress, he abandoned that issue without explanation in the direct appeal. (*Id.*; App. 16-17, 54-72.)

Petitioner then retained new counsel (the undersigned) to raise the Fourth Amendment claims seeking to exclude the drugs found in the trunk as illegally seized without probable cause. (App. 73-92.) This issue was raised in a post-conviction motion filed in the Berrien County Circuit Court. (*Id.*) The claim alleged that Petitioner's original defense counsel rendered ineffective assistance of counsel by first seeking to suppress the drugs, and then waiving that claim in the direct appeal. (App. 88-91, 133-134.)

The trial court denied relief, as did the Michigan Court of Appeals and Michigan Supreme Court – all without

issuing any statement of reasons for denying review of the issue. (App. 1-15.) The specific claim that was raised and lost in state post-conviction proceedings was that Griffin's prior trial attorney who handled his direct appeal to the Michigan Court of Appeals had rendered ineffective assistance of counsel by abandoning a valid claim of unlawful search and seizure. (App. 1-15.)

In the state post-conviction petition filed in state court on that Sixth Amendment issue, Petitioner relied on this Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365 (1986) to support his ineffective assistance of counsel claim. (App. 88-92.) The Michigan Courts not only failed to rule on the claim at all, but also denied any evidentiary hearing or oral arguments on the issue. (App. 1-15.) The Michigan Courts issued summary orders denying the claim without a specific statement of reasons why relief was denied on that issue. (App. 1-15.)

This Petition seeks issuance of a writ of certiorari from this Court and is timely filed. It seeks to have this Court grant certiorari to address the substantial Sixth Amendment claim. The Petition seeks a remand order instructing the Michigan Courts to hear and decide the Sixth Amendment or Fourth Amendment claims on their merits.

REASONS FOR GRANTING THE WRIT

I. THE MICHIGAN COURT HAS SAID THAT PETITIONER SHOULD HAVE REVIEW OF HIS SIXTH AMENDMENT CLAIMS IN POST-CONVICTION PROCEEDINGS IN STATE COURT, BUT THEN HAS MISAPPLIED SETTLED SIXTH AMENDMENT DOCTRINES SET FORTH IN U.S. SUPREME COURT CASE LAW TO IMPOSE AN UNDULY NARROW DEFINITION OF WHAT CONSTITUTES APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL SO AS TO BAR MANY VALID SIXTH AMENDMENT CLAIMS, OF HUNDREDS OF LITIGANTS, INCLUDING THOSE OF THE PETITIONER.

Petitioner's counsel raised the potentially meritorious Fourth Amendment claim in the trial court (App. 16-17),

but then did not pursue it in the direct appeal. (App. 54-73.) As a result, Petitioner lost the ability to have Michigan Courts review on the legal merits his Sixth Amendment and Fourth Amendment claims. Michigan Courts refused to allow a hearing on this claim of ineffective assistance of counsel, or to decide Fourth Amendment issues it raises, or to afford any relief on either issue. (App. 1-15.)

The issue on which certiorari may be granted is that Michigan Courts limit the scope of relief given in state post-conviction proceedings based on an incorrect view of federal law. The result is that Petitioner has lost the benefit of the relief he seeks here – namely, suppression of the drugs in the trunk that led to his conviction. (*See* Issue II below in this Petition, pp. 17-27.) Petitioner requests that this Court accept this case to declare, as only this Court can, that the Michigan Courts misinterpreted the scope of the right to appellate counsel in a direct appeal from a criminal conviction as defined by this Court's prior Sixth Amendment cases.[2]

The limits on state post-conviction relief for ineffective assistance of counsel claims were adopted by the Michigan Supreme Court in *People v. Reed*, 449 Mich. 375, 535 N.W.2d 496 (1995). Michigan committed itself formally to allowing review of all Sixth Amendment claims in its post-conviction review of criminal convictions.[3] But in doing so, the Michigan Supreme Court defines the scope of the Sixth Amendment claims it would hear too narrowly. Moreover, it did so as a matter of federal law, and not under a state-created procedural rule. Under the Michigan rules that

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[2] As used in this petition, the term "post-conviction review" refers to state proceedings for post-appellate review or collateral review.

[3] Under Michigan rules of criminal procedure, a defendant may raise a claim of the denial of his right to effective assistance of appellate counsel in a petition for post-judgment relief under Mich. Ct. R. 6.500, *et seq.* *See generally*, Stuart Friedman, "Article: Hurdling the 6.500 Barrier: A Guide to Michigan Post-Conviction Remedies," 14 T.M. Cooley L. Rev. 65 (1997) (collecting cases interpreting the Michigan Court Rule that defines the limits of collateral review of criminal convictions in Michigan).

govern review of criminal convictions, a defendant may raise a claim that his appellate attorney violated his Sixth Amendment rights by waiving an issue in the direct appeal *only* after the appellate counsel in the direct appeal completes his work. The attorney is not expected to raise a claim of ineffective assistance against himself. Yet, the rules adopted by the Michigan Supreme Court in *Reed*, 449 Mich. 375, 535 N.W.2d 496, to limit such petitions, precludes review of meritorious claims of ineffective assistance of appellate counsel during the direct appeal of the criminal conviction.[4]

The problem addressed here is that the Michigan standard for reviewing ineffective assistance of appellate counsel in the direct appeal falls *below* the federal Sixth Amendment threshold, leaving such claims without a remedy. The problem began with *People v. Reed*, 449 Mich. 375, where the Court held that where a criminal defendant relies on an error of counsel to meet the "good cause" requirement, the proponent must demonstrate a violation of the Sixth Amendment right to effective assistance of appellate counsel to prevail.[5] In the process of declaring this rule, however, the Michigan Supreme Court erroneously interpreted the scope of Sixth Amendment rights. Specifically, the Michigan Supreme Court in *People v. Reed* held that the only way to show a Sixth Amendment violation in a post-conviction proceeding and obtain relief when it is shown is to meet a higher standard than this Court has imposed. While the Michigan Courts could have adopted this limit on state post-conviction relief as a

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[4] It should be noted that Michigan does not apply a higher state standard in determining whether counsel was ineffective, as the Michigan Supreme Court held in *People v. Pickens*, 446 Mich. 298, 521 N.W.2d 797 (1994).

[5] The Michigan Supreme Court refused to find that errors of appellate counsel less than ineffective assistance of counsel would constitute "cause" for purposes of Mich. Ct. R. 6.508, by relying on its flawed interpretation of this Court's ruling in *Murray v. Carrier*, 477 U.S. 478 (1986). *See People v. Reed*, 449 Mich. at 380, 535 N.W.2d 496 (citing and discussing *Murray*).

matter of state law, they have instead fashioned this procedural bar solely on the basis of an (erroneous) application of what the Sixth Amendment requires.[6] *See also People v. Kimble*, 470 Mich. 305, 313, 684 N.W.2d 669, 674 (2004), citing *People v. Reed*, 449 Mich. 375, 535 N.W.2d 496.[7]

The Michigan Supreme Court's approach is contrary to federal law, even though the Court paid homage to the Sixth Amendment in deriving these procedural rules from it. the majority opinion in *People v. Reed*, 449 Mich. 375, 535 N.W.2d 496, makes clear, a Sixth Amendment claim will succeed in post-conviction review only "if [the defendant's appellate attorney says that] discretion was actually exercised." The claim of ineffective assistance provided by the appellate counsel in the direct appeal will be rejected in Michigan post-conviction review under this test if the Court finds there was *any* exercise of strategy by the appellate counsel, even if the strategy justification given by the attorney was incorrect and reasonable in light of applicable law. *Reed*, 449 Mich. 375, 535 N.W.2d 496. It that condition is met, then the Michigan Courts deny relief on the basis that the failure of counsel to raise a valid legal issue was not "significant and obvious." Thus, according to the *Reed* decision, *any* strategic decision by criminal defendant's appellate counsel to not raise an issue in the

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[6] The Michigan Court Rule being interpreted is a Michigan Court Rule, see *Reed*, 449 Mich. 375, 535 N.W.2d 496, citing Mich. Ct. R. 6.500 *et seq.* This rule defines the only method of demonstrating entitlement to relief when challenging a criminal conviction in Michigan after the direct appeal is concluded.

[7] Under this Michigan Court Rule, a criminal defendant may only demonstrate entitlement for relief if he can show "good cause" for the procedural default (i.e., failure to raise the issue in the direct appeal) and "actual prejudice." The Michigan Supreme Court has made clear that a criminal defendant is entitled to post-conviction relief under Mich. Ct. Rule 6.500 if he shows "good cause" which is equated, under the test set forth in *People v. Reed*, 449 Mich. 375, with a showing of "ineffective assistance of counsel, as defined by this Court's Sixth Amendment case law, *People v. Kimble*, 470 Mich. at 313. These concepts were borrowed by the Michigan Supreme Court from this Court's case law interpreting the federal habeas corpus statute.

direct appeal serves as a basis to preclude all relief on the Sixth Amendment claim in state post-conviction review.

The Michigan Supreme Court rejected the test announced by the Seventh Circuit Court in *Gray v. Greer*, 800 F.2d 644 (CA 7, 1985). Under the analysis of that Seventh Circuit decision in *Gray*, the failure of defendant's appellate counsel's to raise "significant and obvious" appellate issues can constitute ineffective assistance of counsel. *Id.* at 646. The Seventh Circuit in *Gray* adopted a weighing test that has been favorably cited by this Court in *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). The *Gray v. Greer* formulation of the Sixth Amendment rights is widely followed by federal appellate courts.

In contrast to this proper application of the Sixth Amendment, the analysis in *People v. Reed*, 449 Mich. 375, departs from federal law, even while purporting to follow the Sixth Amendment. Michigan Courts clearly mis-read federal law on this key point (of when an exercise of strategy by appellate counsel in waiving an issue violates the Sixth Amendment). The error in the Michigan Supreme Court's *Reed* decision can be located squarely in its mis-reading of this Court's decision interpreting the Sixth Amendment right to counsel in *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

In *Kimmelman v. Morrison*, 4 U.S. 365 (1986), this Court found that failure of an attorney to pursue a Fourth Amendment violation claim on appeal could be reviewed in federal habeas corpus proceedings, *even though federal courts will normally refuse to hear habeas corpus cases involving search and seizure questions*. *Kimmelman* held that an attorney's actions taken in the face of ignorance of the law cannot be good strategy, and must be taken into account, when deciding if the attorney rendered ineffective assistance of counsel. Under the *Kimmelman* standard, a Defendant must prove that counsel's failure to raise a Fourth Amendment claim was not based on strategic considerations and further that had the motion been granted, a different result was likely.

This Court's *Kimmelman* decision expressly rejects the approach taken by the Michigan Supreme Court in *People v. Reed*, 449 Mich. 375, 535 N.W.2d 496. A simple reading of the direct holding in *Kimmelman* shows why the Michigan approach is wrong. The attorney in *Kimmelman* was unaware of the evidence and therefore failed to seek adequate pretrial discovery. This Court rejected the State's argument that the defendant's counsel's failure to raise the issue can be deemed to be reasonable strategy where it is based on this type of inexcusable ignorance as to how the controlling law would apply to the key facts:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic consideration but because, until the day of trial, he was unaware of the search and of the State's intention to introduce the bed sheet into evidence. Counsel was unaware of the search and seizure because he had conducted no pretrial discovery. *Counsel's failure to request discovery again, was not based on "strategy," but on counsel's mistaken belief that, the state was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preference would determine whether the State proceeded to trial after an indictment had been returned.*
>
> Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference," to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. (Emph. Added.)

477 U.S. at 385. The Court further found that counsel's ignorance of the applicable law further justified this result:

> The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for

> inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an " 'ample opportunity to meet the case of the prosecution,' " and the reliability of the adversarial testing process. (Citations omitted).

The Michigan Supreme Court in *People v. Reed* misapplied *Kimmelman*, and the use of the wrong Sixth Amendment standard has resulted in the Petitioner being denied relief on a valid federal claim. This use of quasi-federal limits to create a state procedural bar may be unique. Regardless of whether a few other states may have similar limits, however, other states do not attribute them to a state court reading of the U.S. Supreme Court Sixth Amendment case law. This makes the Michigan procedural bar unique. Moreover, the application of this bar to all review of such Sixth Amendment claims in state post-conviction proceedings in Michigan effectively denies access to criminal defendants in Michigan who seek an adequate state remedy after their direct appeal for such ineffective assistance of appeal counsel claims.

Petitioner asks that this Court grant this Petition to enforce the standard of objective unreasonableness of appellate counsel waiving valid legal claims that it set forth both in *Kimmelman*, 477 U.S. at 385, and in the more recent decision in *Wiggins v. Smith*, 539 U.S. 510, 515, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). This Court should remand this case to insure the Michigan Supreme Court's Sixth Amendment test adopted in *People v. Reed*, 449 Mich. 375, to limit review of Sixth Amendment claims does not effectively deny access to a remedy where there is a violation of federal law, as the Michigan Courts did in this case.

When the failure to raise an issue results from ignorance of the law by an appellate attorney, it is not the product of informed lawyering to which the Court should pay any deference. *See Kimmelman v. Morrison*, 744 U.S. 365 (1986); *Gray v. Lynn*, 6 F.3d 265, 268-69 (5th Cir. 1993). There are numerous federal cases where appellate counsel has been found ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to "raise significant and obvious legal issues without any "conceivable tactical or strategic reason." II J. Liebman, *Federal Habeas Corpus Practice and Procedure*, §26.3b (2001, Supp. 2004).[8]

The refusal of Petitioner's appellate counsel to raise a valid, and non-frivolous, Fourth Amendment claim on direct appeal, that appellate counsel had himself preserved in the trial court, was a Sixth Amendment violation under a proper view of Sixth Amendment case law.[9] The same rule should apply in Michigan post-conviction proceedings. The Michigan Courts relied exclusively on a misapplication of the Sixth Amendment to limit post-conviction review.

The Michigan Supreme Court relied on its flawed analysis of the Sixth Amendment in error to impose this procedural bar based on its mis-reading of *Jones v. Barnes*, 463 U.S. 745, 754, n.7 (1983), and *Murray v. Carrier*, 477 U.S. 478 (1986). Neither this Court's decisions in *Jones* nor *Murray* provide a proper Sixth Amendment test that can

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[8] Under *Strickland*, appellate counsel has a duty to investigate a criminal defendant's file as a prerequisite to exercising sound appellate strategy. Failure to conduct such investigation is not entitled to deference. *Orazio v. Dugger*, 876 F.2d 1508, 1513 (11th Cir. 1989). *See Wiggins v. Smith*, 539 U.S. 510, 515; 123 S. Ct. 2527; 156 L. Ed. 2d 471 (2003) (applying objectively unreasonable attorney conduct test in finding trial counsel to have rendered ineffective assistance of counsel.)

[9] *See, e.g., Smith v. South Carolina*, 882 F.2d 895, 898 (4th Cir. 1989), *cert. denied*, 493 US 1046 (1990). In *Clay v. Director*, 749 F.2d 427, 430-32 (7th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985), the Court held appellate counsel's failure to perfect an appeal on valid issues, as client wished, was sufficient cause under *Wainwright v. Sykes*, 433 U.S. 72 (1977) to obtain relief later on the waived issues.

justify the Michigan Courts' limitation on post-conviction review of valid ineffective claims.[10] While *Jones* allows an appellate attorney to withhold issues, this decision must be done as part of the exercise of "sound professional judgment of counsel." *Haskins v. Lecureux*, 16 F.3d 1219, 1219 (6th Cir. 1994). In reaching this decision, the reviewing court must look at the issues raised and the issues waived. *Ellis v. Lynaugh*, 873 F.2d 830 (5th Cir. 1989). Here the other issues that were raised on appeal would not have conflicted with each other. The issues presented were for the most part procedurally defaulted, and the rejected issue was properly preserved. *Jones v. Barnes*, 463 U.S. 745 (1983), does not allow counsel to refuse to raise significant and obvious issues, *see Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986); *Kurina v. Thieret*, 853 F.2d 1409, 1417 (7th Cir. 1988), as the Michigan Supreme Court improperly held in *Reed*.[11] Only by a clear mis-reading of federal law have Michigan Courts limited post-conviction

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[10] The Michigan Supreme Court's lead opinion in *Reed* erroneously treated *Murray* as an ineffective assistance of counsel case. 449 Mich. at 384. *Cf.* 449 Mich. at 414 (Levin, J. dissenting) (also noting the analytical flaw in the majority's opinion). This reliance by the Michigan Supreme Court on these cases was clear error. The defendant in *Jones v. Barnes* had waived claims of his counsel's ineffective assistance of counsel. 463 U.S. at 754 n.7. Similarly, *Murray v. Carrier*, 477 U.S. 478 (1986) *did not even involve an ineffective assistance of counsel claim.* 474 U.S. at 484. The Michigan Supreme Court should have known that the question decided in *Murray* was whether attorney error that was less than ineffective assistance of counsel was a basis for relief. 477 U.S. at 484. The Court found it was not. Indeed, the *Murray* Court, in part, declined to adopt the proposed cause exception, finding that the more egregious errors could be redressed through ineffective assistance of counsel claims. 477 U.S. at 496.

[11] The federal and state courts have refused to excuse derelictions by defense counsel by blithely sweeping them under the "trial strategy" or "appellate strategy" umbrella. These courts correctly recognize that basic investigation of applicable law is a prerequisite to the exercising of sound trial or appellate strategy. *See, e.g., Neally v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985); *House v. Balkcom*, 725 F.2d 608, 617-18 (11th Cir. 1984); *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1983).

review so as to deny any relief to valid claims of a denial of effective assistance of appellate counsel.

The Sixth Amendment does not permit a defendant's appellate attorney in the direct appeal to waive a valid claim, unless failure to raise the appeal issue is part of a *sound* exercise of professional judgment based on a correct view of the law.[12] It was not professionally reasonable for Petitioner's original defense counsel not to raise the Fourth Amendment claim in the direct appeal, when the case law suggests this is a valid claim, particularly after this first defense counsel raised that claim in the trial court. It is not reasonable for counsel to waive a constitutional claim whose validity can be determined with only cursory research.[13]

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[12] For cases holding that counsel has a constitutional duty to provide accurate advice to his client, *see Risher v. United States*, 992 F.2d 982 (9th Cir. 1993); *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991); *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990); *Hill v. Lockhart*, 877 F.2d 698 (8th Cir. 1989), *rehearing granted and aff'd*, 894 F.2d 1009, *cert. denied*, 497 U.S. 1011 (1990).

[13] *See, e.g., United States v. DeLaFuente*, 8 F.3d 1333, 1336-37 (9th Cir. 1993); *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993) (counsel's failure to appeal erroneous restitution award was appellate ineffective assistance of counsel); *Dawan v. Lockhart*, 980 F.2d 470, 473-74 (8th Cir. 1992) (trial counsel should have challenged his own conflict of interest in post-trial motion and on appeal, and failure to do so was "cause" to justify raising issue in habeas action); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992) (counsel's failure to raise Fifth Amendment claim on appeal despite ample precedent for claim was ineffective assistance rising to the level of "cause"); *Hollis v. Davis*, 941 F.2d 1471, 1477-78 (11th Cir. 1991), *cert. denied*, 111 S. Ct. 698 (1991) (trial counsel's failure to challenge racially discriminatory jury selection practice because of his unfamiliarity with equal protection law constitutes ineffective assistance of counsel and "cause" to avoid procedural default); *Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 698 (1991) (counsel's decision to forego motion was not part of sound trial strategy or reasonable exercise of processional judgment, thereby amounting to "cause" to permit habeas review in post-conviction proceeding); *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989) (counsel ineffective in failing to challenge trial court's denial of the defendant's request for self-representation at trial level); *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987) (appellate counsel was ineffective in failing to challenge a "blatant Fifth Amendment violation");

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Had the Michigan Courts properly applied Sixth Amendment cases to properly define the scope of state post-conviction relief, they would likely have allowed Petitioner to successfully claim that the drugs found in the trunk were illegally seized, and could be suppressed, leading to dismissal of the charges against him. (*See* discussion of this in Issue II).

The Court should remand this case to the Michigan Supreme Court to clarify its approach to review of Sixth Amendment claims in post-conviction state appeals. This Court has found a federal question that was presented by state court ruling holding its state law or constitution is to be read *in pari materia* with the federal constitution, and then proceeded to decide the federal questions raised by the state courts in several cases.[14]

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF THE PETITIONER WAS DETAINED IN VIOLATION OF THE FOURTH AMENDMENT BY THE SIDE OF THE ROAD AFTER A ROUTINE TRAFFIC STOP OF HIS CAR WHERE THERE IS AN ISSUE OF WHETHER HE COULD HAVE BEEN VALIDLY ARRESTED, AND INSUFFICIENT OTHER CAUSE EXISTED TO DETAIN HIM FOR AN UNREASONABLY LONG PERIOD OF TIME – LASTING AN HOUR OR MORE – SO POLICE COULD CONDUCT A DOG SNIFF OF HIS CAR TO JUSTIFY A SEARCH OF THE TRUNK.

The Issue Presented. This case raises the question of whether the police may stop vehicles to detain drivers at

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Houston v. Lockhart, 982 F.2d 1246 (8th Cir. 1993) (remanding case for a hearing to determine whether there was a significant non-record issue and whether counsel erred in failing to raise it).

[14] *See New York v. Class*, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986); *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987); *ASARCO v. Kadish*, 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989); *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990).

the roadside for a long period of time (e.g., from 30 minutes to an hour or longer) until a narcotics detection team can be called to dog sniff the vehicle. The question is a two-fold one:

> First, what degree of justification do police obtain to conduct investigations while holding a driver in detention on the road during a routine traffic stop, and
>
> Second, are there any reasonable time limits that can be imposed on the duration of that justification to investigate a driver by holding them at the side of the highway during the stop without cause to arrest.

The Probable Cause To Arrest Griffin At The Scene Is Lacking.

Robert Griffin presented a valid Illinois driver's license to Trooper Coleman as soon as he was stopped and asked to produce identification. Trooper Coleman claimed at the preliminary examination hearing that he arrested Griffin for driving on a suspended license which is a misdemeanor. But Trooper Coleman's exact words on cross-examination before trial *were* that Griffin's license was *not* suspended because the suspension period was over – and that the only reason he did not have a valid Michigan driver's license was due to his decision not to pay the reinstatement fee. (App. 36.) The record is thus clear that Griffin did not renew his Michigan driver's license, and so it lapsed, and he got an Illinois license. (*Id.*) Thus, Trooper Coleman's testimony does *not* support a claim that he validly arrested Griffin due to driving on a "suspended" license *since*, at the time of the traffic stop, the police officer knew that the Michigan driver's license had merely "lapsed" or "expired" (i.e., after it had been suspended, but after the suspension period was over).

The State offered no proof before or at trial to suggest any other reason why Griffin could be arrested for driving on a suspended license. The record shows to the contrary – he could not be arrested for that reason. It is lawful to get a license in another state *after* one's license in Michigan is

no longer suspended. (*See* further discussion on this page). The State never showed he obtained the Illinois license improperly or that it was invalid.

The record is undisputed that Griffin's Illinois driver's license was not suspended or invalid. Thus, the trunk of Petitioner's car was not validly searched pursuant to a valid arrest for driving on a suspended license. The search must be justified, if at all, on other grounds.

Griffin was residing in Chicago at the time of the traffic stop, and as a non-resident he qualifies to drive in Michigan on an Illinois license. (App. 31.) It is undisputed that Griffin gave the police officer his Illinois driver's license. (*Id.*) He did so *after* telling the officer he was driving to Michigan from Illinois (where he lived and worked). Griffin said he was coming to Michigan for a short visit with son (who was living in Kalamazoo, Michigan). (App. 35-36.)

Michigan law provides that a person may lawfully driver a vehicle in Michigan if they possess a valid driver's license from another state. The Motor Vehicle Code in Michigan exempts non-residents from having to obtain a Michigan driver's license. *See People of Oak Park v. Glantz*, 124 Mich. App. 531, 335 N.W.2d 80 (1983) (holding that a non-resident who has obtained an operator's license in his home state and has such license in his possession is exempt from Michigan's licensing requirements). *Glantz* also holds that while non-residents are exempt from having to obtain a Michigan license, they may still be convicted of driving while license suspended if the driver's Michigan license was suspended at the time. *Id.*

Petitioner Griffin's post-conviction motions and briefs sought to establish how there had been inadequate probable cause to search the trunk. His post-conviction appeal argued he was lawfully driving at the time of the stop and so he could not be arrested lawfully for driving on a suspended license. The claim was not heard by the Michigan Courts. (App. 73-92.)

The fact that Petitioner elected to get an Illinois license, after allowing his Michigan driver's license to

lapse, does not give probable cause to search the trunk. Griffin sought to establish this to show the lack of probable cause in his post-conviction review proceedings in Michigan Court. If a hearing would show that his Michigan driver's license was *not* suspended, then there was no probable cause for his warrantless arrest by Trooper Coleman based on Griffin's driving while license suspended. *See generally, Devenpeck v. Anthony*, ___ U.S. ___, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004), and *Whren v. United States*, 517 U.S. 806, 812-815, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996).

Using the same analysis, it is clear that the mere existence of the cell phone, pager, address book and air fresheners in the car do not amount to probable cause to believe a crime was being committed. Almost every American has these items in their car at one time or another. The average American would be shocked to learn if this Court or any Court found that a driver of a vehicle could be suspected of a crime, and that the entire car could lawfully be searched merely due to possession of the above personal items. It is simply not a reasonable conclusion that an arresting officer could draw the conclusion that possession of these items together in a vehicle reveals evidence of the commission of a crime. *See generally, Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 124 S. Ct. 795 (2003) (stating Fourth Amendment test that the question of whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest).[18]

Finally, the fact that an African American who distrusted the police fails to tell an officer he has a prior criminal record is neither a crime or proof of the commission of any present crime. As such, it cannot supply

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[18] This Court's other key cases on defining probable cause to arrest include *Devenpeck v. Anthony*, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004), *United States v. Watson*, 423 U.S. 411, 417-424, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976); and *Brinegar v. United States*, 338 U.S. 160, 175-176, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949).

probable cause to believe that a crime is being committed *at that time*. A driver who lies to police, by denying the existence of a prior criminal record, may simply be trying to "keep their head low" and "stay out of trouble" by keeping off the police officer's radar of suspicion. It is actually *more* likely that the driver says this every time, whether he is committing a crime at the time or not, as a way of dealing with intrusive police inquiries. This Court held in *Berkemer* that police can ask various kinds of questions during a routine traffic stop, but the citizen driving the vehicle has no duty to answer – either truthfully or not. *See Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Under this analysis, the right to refuse to answer the police officer's questions is constitutionally protected conduct, and not evidence of a crime. Further, there is no law in Michigan that makes it a crime to fail to answer a Michigan State Trooper's questions during a routine traffic stop. (By contrast, there is law that makes it a crime to give a false statement to a federal agent). And no law exists in Michigan to punish Petitioner's failure to reveal his prior criminal record.

The police officer's conduct suggests he knew he lacked probable cause to search the trunk. This explains why the officer sought to have the canine unit come to sniff the trunk, rather than concluding that a crime was occurring based on the above facts observed during the stop. Suffice it to say that any claim that probable cause existed to justify a search of the trunk of the car, based on the above facts, and without a dog sniff is spurious. The search of the trunk would have been clearly unlawful if it had been conducted simply based on these observations.

The Petition Raises A Cert-Worthy Fourth Amendment Post-*Caballes* Dog Sniff Issue.

The question presented here is whether the police officer in this case unnecessarily prolonged the stop until a canine unit arrived to conduct a dog sniff of the vehicle. This Court held, in *Illinois v. Caballes*, 160 L. Ed. 2d 842, 125 S. Ct. 834, 846 (2005), that "a seizure that is lawful at

its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." In contrast to the Illinois State Trooper in *Caballes* who stopped the speeding car on the interstate highway for only 10 minutes, and had a narcotics-detection dog in the car at the time of the stop, the traffic stop and detention here lasted over 45 minutes, and possibly well over an hour.[16] A limited period of detention of a motorist is reasonable where probable cause exists to believe a traffic violation occurred. *Delaware v. Prouse*, 440 U.S. 648, 659, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Like *Caballes*, in this case, the police lawfully stopped the Defendant for speeding. However, the police officers detained the Defendant alongside the road for far longer than the 10 minutes this Court said is per se lawful in *Illinois v. Caballes*, 160 L. Ed. 2d 842, 125 S. Ct. 834, 846 (2005).

It is settled law that the police officers in this case, having stopped defendant for a traffic offense, could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention. *See, e.g., United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995).

This Court's recent *Caballes* decision does not read the Fourth Amendment to allow any driver caught speeding to sit for unreasonably long periods of time, baking in the sun, so that a drug dog sniff can occur. Unlike in *Caballes*, this is a case where the police officer unnecessarily prolonged the stop. The original stop was prolonged an hour or so, or more, until a canine unit arrived to conduct a dog sniff of the vehicle. The challenge here is made to

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[16] As to the issue of the precise length of the detention, the record fails to state how long it took the police canine unit to arrive *after* Trooper Coleman called in that unit to come about 45 minutes after the initial stop. If the canine unit took more than 45 minutes to arrive, the stop lasted 90 minutes. But the stop was no shorter than about an hour (assuming it took the canine unit 15 minutes or more to get to the scene).

the long detention on the highway before a canine sniff took place.

The mere fact that the police discover drugs does not justify a long, random detention to search. The police must justify the length of the detention by showing it was reasonable, that they were diligent and efficient in their investigation. All that this Court has said is that the police must only detain a suspect for investigation for a reasonable period of time. *See United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) (upholding a continued detention that lasted only 20 minutes where police were waiting to detain another car seen driving with the vehicle stopped first). In *Sharpe*, the Court held that the investigative stop of only 20 minutes was reasonable given the suspected acted evasively. But, this Court in *Sharpe* also held the stop may not continue indefinitely, and if it does, then it ceases to be an investigative stop.

The rule adopted in *Sharpe* echoed the holding of the Court on the same issue in its original drug dog case, *see United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (airport drug sniff case; police had reasonable suspicion drug courier was arriving in airport; and took suitcase to other airport and seized him 90 minutes while taking suitcase to another airport). This Court in *Place* explained that "the length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." *Place*, 462 U.S. at 709. The *Place* Court held that a prolonged detention of a person for the *sole or primary* purpose of holding them so that a dog may sniff the drugs is a violation of Fourth Amendment because it is fruit of the poisonous tree. *See generally*, LaFave, *Search and Seizure* Vol. III, Sec. 9.3 (West 2004), p. 377-389, et seq.

Settled Fourth Amendment Rules Should Be Refined To Guide Lower Courts.

The Fourth Amendment law in this area is in need of further refinement. The Court's *Caballes* and *Sharpe* decisions provide little guidance that would serve to curb

aggressive police tactics during routine traffic stops that result in unreasonably lengthy detentions.[17] By accepting this case, the Court may adopt of set of guidelines to more reliably cabin police discretion. The facts in this case provide a good example of when detention after a traffic stop is unreasonably lengthy.

The Court's recent *Caballes* decision, viewed against a background of Circuit Court decisions upholding lengthy detentions, may send the wrong signal from this Court to the police. This case involves a stop that lasts an hour or more at the road side.[18] In *Sharpe*, this Court found a 50 minute detention to be unreasonable – i.e., a time period very close to the one hour period. The Court may use this case to draw a similar bright line rule of thumb which provides a maximum time when the length of the detention makes it *presumptively* unreasonable. This rule could be applied with the 10 minute *minimum* safe harbor rule adopted for presumptively valid searches in *Caballes*.

Petitioner relies on recent Sixth Circuit decisions, such as *Joshua v. DeWitt*, 341 F.3d 430 (6th Cir. 2003), that held a 42 minute detention of a driver stopped for a traffic offense is unreasonably long. Other Circuits have followed the Sixth Circuit approach.[19] Some state courts have struck down as too long detentions as short as 20

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[17] For a thoughtful analysis of the dimensions of this problem, *see* "Article: Curbing Aggressive Police Tactics During Routine Traffic Stops in Illinois," 36 Loy. U. Chi. L.J. 819 (Spring 2005).

[18] The one hour period of detention is a convenient threshold time period to mark the amount of time after which such detentions become suspect in almost every case. *See generally U.S. v. Rutherford*, 824 F.2d 831, 834 (10th Cir. 1987) (holding that one hour investigatory detention of car and driver not converted to unlawful arrest when length due in part to 30 minute delay caused by computer problem).

[19] *See, e.g., United States v. Bejarano-Ramirez*, 35 Fed. Appx. 740, 2002 U.S. App. LEXIS 8321 (10th Cir. 2002) (unpublished opinion) (holding 84 minute detention of driver after traffic stop was too long, violating Fourth Amendment so that drugs found from dog sniff must be suppressed).

minutes.[20] In these cases, the Circuits have made clear that the length of the detention may not exceed the time that is warranted to investigate based on the suspicion developed at the time of the initial stop.[21]

The Eighth Circuit also has held that the questions a police officer asks during a routine traffic stop, as well as the context of the search, are significant in deciding if the police conduct is reasonable in particular contexts so as to justify lengthy detentions and delays in conducting a dog sniff after a routine traffic stop. *See United States v. Hernandez*, 313 F.3d 1206 (9th Cir. 2002), citing *United States v. Aldaz*, 921 F.2d 227, 229 (9th Cir. 1990); *United States v. Gill*, 280 F.3d 923 (9th Cir. 2002) (upholding six day delay in conducting dog sniff). Further evidence that this Court should grant this petition is the conflict within Circuits in regard to when a lengthy roadside detention to conduct a canine sniff for drugs is unreasonable.[22]

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[20] *See, e.g., Pryor v. State*, 122 Md. App. 671, 716 A.2d 338 (1998) (the Court of Special Appeals once again held that a twenty-five-minute roadside detention while waiting for a drug-sniffing dog was unreasonable and violated the defendant's Fourth Amendment rights.). In so holding, the rule the Court adopted was that an automobile stop for a minor traffic violation should take no longer than reasonably necessary to issue a citation for the violation committed. Accord *Graham v. Maryland*, 119 Md. App. 444, 705 A.2d 82 (1998).

[21] The Fifth Circuit ruled that the detention after a routine traffic stop was lengthened to an unreasonable period of time to conduct a dog sniff and this violated the Fourth Amendment. *See United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). The Fifth Circuit reached the same basic result for similar reasons in another case *United States v. Portillo-Aguirre*, 311 F.3d 647, 657 (5th Cir. 2002) (holding that "[i]f an agent does not develop reasonable suspicion of [drug] activity before the justifying purpose of a checkpoint stop has been accomplished, he may not prolong the stop.").

[22] In *Sanchez*, the Eighth Circuit found no de facto arrest, and a reasonable detention, where the police stopped a driver for a traffic offense for over 45 minutes to wait for a dog to sniff for drugs. *See United States v. Sanchez*, 2005 U.S. App. LEXIS 16694 (8th Cir. August 10, 2005). In that case, the canine unit was available, as was the case in *Caballes*, but the police waited 40 minutes before using the canine unit to conduct the search. It was held to be a lawful detention. Accord

(Continued on following page)

In summary, the above cases demonstrate that an obvious split exists within and between the Circuits on the issue of when a roadside detention of a driver after a traffic stop lasts almost an hour to conduct a dog sniff of the car. If there is no post-*Caballes* refinement in the Fourth Amendment test by this court – to reign in the outlying cases of the Circuits and State highest courts that have not followed the Court's direction to be reasonable – then the police will abuse the privilege to detain, and abuse this privilege by engaging in unjustifiably long roadside detentions. A rule needs to be created at the other end of the spectrum – i.e., adoption of a rule on when detentions extend too far beyond the initial justifications of the traffic stop.

The Rule Of Fourth Amendment Law Petitioner Seeks Will Help The Lower Courts.

The Court should expressly hold that a routine traffic stop cannot be analogized to a *Terry* stop[23]; and rather, that such stops should be governed by a refined Fourth Amendment rule that would better address the unique concerns involved in citizen-police encounters during routine traffic stops. The traffic stop justification should not extend to authorize lengthy detentions to await a canine unit for over an hour, absent compelling reasons.

The issue the Court should clarify is whether a lengthy traffic stop, and detention at the scene for investigation, should be treated as within a ***new*** Fourth Amendment category. Under current doctrine, this Court has recognized *only* three categories of police-citizen encounters in its

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Chalfy v. Turoff, 804 F.2d 20, 23 (2d Cir. 1986) (25 to 45 minute delay of limousines to write tickets for license violations found to be not unreasonable despite inconvenience to drivers and passengers). The Eighth Circuit found in another case that a detention beyond initial traffic stop was unreasonable when the officer had driver wait in police cruiser 40 minutes until warning ticket issued. *U.S. v. Ramos*, 20 F.3d 348, 352 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2015 (1995).

[23] *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

Fourth Amendment jurisprudence: (1) the consensual encounter, (2) the investigative stop, and (3) custodial arrest. None of these ways of categorizing the stop and detention here either describes or adequately protects the competing interests and rights at stake in this type of citizen-police encounter. A new, fourth category of types of detention – i.e., the non-custodial arrest – is needed to guide Fourth Amendment analysis.[34]

This case is ideal to define when a stop and detention by police after a traffic stop violates the Fourth Amendment because the period of detention to conduct a dog sniff is too lengthy.

III. CERTIORARI SHOULD BE GRANTED TO RECONSIDER THIS COURT'S TRADITIONAL BAR ON HEARING *CERTIORARI* PETITIONS FROM STATE COURT POST-CONVICTION PROCEEDINGS WHERE THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT MAY FUNCTIONALLY BAR HABEAS COURT REVIEW OF THE QUESTION OF THE SCOPE OF THE STATE APPELLATE COUNSEL'S SIXTH AMENDMENT DUTY TO THEIR CLIENTS.

Petitioner asks that this Court relax its traditional approach of declining to hear petitions for certiorari in appeals from state post-conviction proceedings. This Court has refused to hear certiorari petitions coming from state post-conviction proceedings without establishing any definitive policy or setting forth a rationale for exceptions that ought to exist, at least since *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965) (Clark, J.,

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[34] For a well developed argument advocating the creation of a category of "custodial arrest" under Fourth Amendment doctrine to resolve issues arising during routine traffic stops, *see* David A. Moran, "Traffic Stop, Littering, Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine," 37 Am. Crim. L. Rev. 1143 (Summer, 2003).

concurring); *Huffman v. Florida*, 435 U.S. 1014, 98 S. Ct. 1888, 56 L. Ed. 2d 298 (1990) (Stevens, J., concurring).[25]

The *Case v. Nebraska* doctrine should not be relied on to deny review of the important Sixth Amendment constitutional question presented in this Petition given the subsequent statutory developments. Subsequent to these decisions, Congress has passed, and the President has signed, the Anti-Terrorism and Effective Death Penalty Act of 1996. This Act effectively eradicates protections this Court relied on in *Case*, *Huffman* and *Kyles*. Under AEDPA, a federal court is required to defer to a state court's interpretation unless it is unreasonable. To be reviewed, the state court's result must be not only incorrect but also objectively unreasonable. *See Wiggins*, 539 U.S. at 520-521, 156 L. Ed. 2d 471, 123 S. Ct. 2527.

If this Court denies review, then Petitioner will have to raise his Fourth and Sixth Amendment claims in federal habeas court proceeding where he may be denied relief even though he has a legally meritorious claim of denial of federal constitutional rights. The reason he may lose in federal habeas review, despite having a valid claim, is that the federal court must give statutory deference to erroneous, but reasonable, state rulings on issues involving federal constitutional rights. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214. This Court made the limits of habeas corpus review clear in *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (per curiam), by holding that, under AEDPA, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision

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[25] This Court has never held that a state is constitutionally obligated to provide post-conviction remedies in the first place, and so it "usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." *Kyles v. Whitley*, 498 U.S. 931, 932, 111 S. Ct. 333, 112 L. Ed. 2d 298 (1990).

applied [the law] incorrectly." The State also may seek to limit Petitioner from obtaining relief in federal habeas corpus proceedings because he raises a Fourth Amendment claim.[26] This Court should remand the case back to the Michigan Courts to review the claims since federal habeas corpus review may not grant full relief.

CONCLUSION

The reason to grant this Petition is to insure that a litigant who has a valid Sixth Amendment claim has some forum in which to obtain the remedy for a clear violation of the Sixth Amendment. In this case, Petitioner's appellate attorney on direct appeal waived his Fourth Amendment rights by not raising the issue in the direct appeal. The Michigan Courts denied relief on that claim in the post-conviction proceedings in violation of their self-imposed duty to review all claims of violations of federal constitutional rights. This Court's decisions dictate that the Petitioner must have his claim reviewed fully on the merits. Congress passed AEDPA believing the States allowed adequate post-conviction review of claims of violations of constitutional rights leading to conviction.

The Michigan system of denying counsel in guilty plea appeals was found to be unconstitutional by this Court last Term. *See Halbert v. Michigan*, ___ U.S. ___, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

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[26] Federal habeas court review of Petitioner's Fourth Amendment claim may be limited by the doctrine in *Stone v. Powell*, 428 U.S. 426 (1976). *Stone* held that federal habeas corpus relief is not available to redress violations of the Fourth Amendment exclusionary rule – i.e., to require suppression of the fruits of unlawful arrests, searches and seizures. *Stone* does not apply here, however, since the petitioner was *not* afforded a full and fair opportunity to litigate that claim in state court.

This petition for certiorari asks that this Court address a federal constitutional question in a similar manner as the Court has done in those prior cases. This case would follow the same theme as Last Term's case striking down Michigan's system of denying counsel to defendants on direct appeal in all guilty plea cases due to its failure to properly protect Sixth Amendment rights. This case raises a similar issue. The feature of the Michigan appellate system at issue here is that Michigan bars review of the claim in the post-conviction review proceedings, after the appellate attorney had failed to raise the valid claims. The only reason why Michigan has this limit, moreover, is that the Michigan Supreme Court erred in its reading of the scope of Sixth Amendment rights to ineffective assistance of appellate counsel under this Court's decisions. If this Court clarifies that the Sixth Amendment is broader, then Michigan Courts will allow the claims.

In conclusion, Petitioner asks this Court to instruct the Michigan Supreme Court to reach and decide the Fourth Amendment claim raised by Petitioner in his post-conviction motion if the Michigan Courts find, on remand, that Petitioner's first appellate attorney was ineffective. For these reasons, Petitioner Robert Lanell Griffin respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

ROBERT LANELL GRIFFIN,

Defendant-Appellant.

UNPUBLISHED
February 25, 2000

No. 216720
Berrien Circuit Court
LC No. 98-403728-FH

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver greater than 225 but less than 650 grams of cocaine, MCL § 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). He was sentenced as a second offender, MCL § 333.7413(2); MSA 14.15(7413)(2), to a term of twenty to sixty years. We affirm.

On appeal, defendant contends that the trial court abused its discretion by allowing the arresting officer to testify regarding the significance he placed upon the bundled air fresheners, cellular telephone, and pager found in the car after defendant had been arrested. It is defendant's contention that this was drug courier profile testimony improperly offered by the prosecution as substantive evidence of his guilt. There is no merit to this claim.

A drug courier profile is a somewhat informal compilation of otherwise innocuous characteristics believed by law enforcement to be typical of persons unlawfully trafficking

in narcotics. See *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). These profiles are commonly used by police officers as an investigative technique to establish a basis for reasonable suspicion to stop and question a suspect, or to form probable cause. *Id.; United State* [sic] *v Lui*, 941 F2d 844, 847 (CA 9, 1991). This Court has previously held that because such profiles "may suggest that innocuous events indicate criminal activity," drug courier profile evidence is inherently prejudicial and thus inadmissible as substantive evidence of guilt. *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999); *Hubbard, supra* at 240-241. In other words, the evidence may not be admitted for the purpose of demonstrating that the defendant is guilty because he fit the characteristics of a certain drug profile. This is not to say, however, that testimony concerning such characteristics is to be considered inadmissible on all grounds. Evidence concerning background or modus operandi does not specifically address the guilt or innocence of the defendant, but rather enables the jury to understand other evidence that does address guilt or innocence. *Murray* at 54.

Noting that the distinction between the proper use of profile evidence as background or modus operandi evidence and its improper use as substantive evidence of guilt is often subtle, the *Murray* Court outlined several factors which it considered helpful to a determination of the admissibility of such evidence:

> *First, the reason given and accepted for the admission of the profile testimony must only be for a proper use – to assist the jury as background or modus operandi explanation. . . . Second, the profile, without more, should not normally enable a jury to infer the defendant's guilt.* The prosecutor

> must introduce and argue some additional evidence from the case that the jury can use to draw an inference of criminality; multiple pieces of a profile do not add up to guilt without something more. In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt. *Third, because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence.* Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony. *Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied.* [*Id.* at 56-57 (Emphasis added) (Citations omitted).]

In this case, the prosecutor offered two proper reasons for admission of the disputed testimony, each of which was ostensibly proper. First, the prosecutor argued at trial that the testimony was necessary to explain the events which led the trooper to conduct a search of defendant's vehicle. On this basis, the testimony was not improper drug profile evidence, but rather permissible testimony offered to explain why the trooper continued his investigation of the automobile following defendant's misdemeanor arrest. See *United States v Gomez-Norena*, 908 F2d 497, 501 (CA 9, 1990). The disputed testimony provided the logical connection which gives meaning to the trooper's actions, without which the jury would have been forced to speculate on the trooper's motive or rationale in furthering the investigation. See, e.g., *People v Flynn*, 93 Mich App 713, 719-720; 287 NW2d 329 (1979). The prosecutor also argued that the

testimony was necessary to educate the jury as to the drug-related uses for these otherwise innocuous items of which the jury would be otherwise unaware, again, a permissible use of profile evidence. *Murray, supra* at 59.

Nor was the profile testimony offered by the trooper the sole evidence upon which the jury could infer guilt. The prosecutor did not mention the profile evidence during closing arguments, and did not attempt to present that evidence as a link between defendant and the illegal drugs. At trial, defendant conceded that the sole issue material to defendant's guilt or innocence was whether he had knowledge of the cocaine found in the trunk of the car. A narcotics officer who was qualified as an expert on the value of cocaine testified that the more than 500 grams of cocaine found in the trunk of the car had a value of between $9,000 and $30,000 depending upon how the drug processed and sold. Considering that defendant was the sole occupant of the car at the time it was stopped, the jury could reasonably infer that defendant had knowledge of the cocaine as it is unlikely that an individual would entrust such a highly valuable cargo to an unknowing transporter. It could likewise be inferred that the writing on the back of the business card found during the arresting officer's search was consistent with a record of drug sales or purchases. While ownership of the card was disputed, the prosecutor also introduced an address book found on defendant that contained an abbreviated name identical to one of those found on the back of the card, strengthening the inference that the card was in fact defendant's. Furthermore, the claimed owner of the card, who was defendant's cousin and the owner of the car in which the cocaine was found, testified at trial that although he received that business card from a friend, he could not recall that friend's name.

Defendant's cousin further stated that he did not know the real names of any of the people whose names were abbreviated on the card, although he had written them down himself, and could not remember what the numbers printed next to each name represented. Moreover, this individual stated that he was certain that he and defendant had no common associates or friends.

As defendant argues, no cautionary instruction was given in this case. However, because defendant failed to request any instruction limiting the use of the trooper's testimony, the court's failure to so instruct the jury cannot be grounds for setting aside the verdict. See MCL § 768.29; MSA 28.1052. Moreover, the lack of a jury instruction on this matter is merely one consideration in the determination of the admissibility of the disputed evidence. See *Murray, supra* at 57, citing *United States v Williams*, 957 F2d 1238, 1241 (CA 5, 1992); *Gomez-Norena, supra*.

Finally, the trooper who testified in this case did not attempt to link the profile testimony to defendant in a manner that would suggest his guilt simply from his resemblance to profile characteristics. The trooper merely testified that in his experience drug couriers often use air fresheners to mask the smell of drugs, and that some use pagers and cellular telephones in order to stay in constant communication with customers and suppliers. This testimony was proper explanation of the modus operandi of drug dealers, but left to the jury the decision as to whether these innocuous items were in fact used for these purposes by defendant. *Murray, supra* at 62.

As a final consideration, we note that defendant also argues that because the trooper was never qualified as an expert by the court, his testimony as to the significance of

these items was admitted in error. However, at trial defendant did not object to the trooper's testimony on this basis. Defendant's argument below was merely that the substance of the trooper's testimony was improper, not that the trooper lacked the "knowledge or expertise" to reliably testify to such facts. See MRE 702. Moreover, on appeal, defendant does not challenge the trooper's qualifications as an expert regarding his observations during a drug arrest, but only the fact that the he was not specifically qualified as such an expert by the trial court.

Where there has been no objection, this Court will not review the admission of evidence absent a showing of manifest injustice. MRE 103(a)(1); *People v Metzler,* 193 Mich App 541, 548; 484 NW2d 695 (1992). A person may be qualified to testify as an expert witness by virtue of his or her knowledge, skill, experience, training, or education in the subject matter of the testimony. MRE 702; see also *People v Fowler,* 193 Mich App 358, 362-363; 483 NW2d 626 (1992). In this case, the trooper testified that he had nearly six years of law enforcement experience and that he had participated in many traffic stops that had resulted in the discovery of illegal drugs. Thus, the trooper would in all probability have been qualified as an expert for purposes of his limited testimony even if defendant had raised any challenge to his qualifications to testify regarding the modus operandi of drug traffickers. We find no manifest injustice.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald

Court of Appeals, State of Michigan

ORDER

People of MI v Robert Lanell Griffin

Docket No. 216720

LC No. 98-403728-FH

David H. Sawyer
Presiding Judge

Roman S. Gribbs

Gary R. McDonald
Judges

The Court orders that the motion for rehearing is DENIED.

/s/ David H. Sawyer
Presiding Judge

[SEAL] A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

May 24, 2000 /s/ Carl L. Gromek
Date Chief Clerk

MICHIGAN COURT OF APPEALS

Case Number: 216720
PEOPLE OF MI V ROBERT LANELL GRIFFIN

1	**PEOPLE OF MICHIGAN** Oral Argument: Y Timely: Y	PL-AE	PRS	(49413) **Mead Aaron J** 811 Port St County Courthouse St Joseph MI 49085 269-983-7111
2	**GRIFFIN ROBERT LANELL** Oral Argument: Y Timely: Y	DF-AT	RET	(14978) **Hills James D** 425 South Westnedge Kalamazoo MI 49007-5051 616-344-6771

Status: Case Concluded; File Archived **SCT Status:** CLOSE

1/4/1999 1 **Claim of Appeal – Criminal**
Proof Of Service Date: 12/30/1998
Check #: 68909 Fee: $250.00
Attorney: 14978 – HILLS JAMES D

12/1/1998 2 **Order Appealed From**
From: BERRIEN COUNTY CIRCUIT COURT
Case Number: 98-403728-FH
Trial Court Judge:
27645 NELSON THOMAS E
Comments: DEL/MFG CONT SUBST 225-64

1/21/1999 5 **Notice of Filing Transcript**
Date: 12/29/1998
Reporter: 4617 – SPRINGMAN TERRI L

2/19/1999 6 **Motion: Bond**
Proof of Service Date: 2/16/1999
Check No.: 90061 Fee: $75.00
Filed By Attorney: 14978 – HILLS JAMES D
For Party: 2 GRIFFIN ROBERT LANELL
DF-AT

2/23/1999 **7 DEFECTIVE FILING LETTER**
For Party: 2 GRIFFIN ROBERT LANELL
DF-AT
Attorney: 14978 – HILLS JAMES D
Comments: TO HILLS FOR $75 FEE & 4 CC
MOTN BOND

3/1/1999 **8 Brief: Appellant**
Proof of Service Date: 3/1/1999
Oral Argument Requested: Y Timely Filed: Y
Filed By Attorney: 14978 – HILLS JAMES D
For party: 2 GRIFFIN ROBERT LANELL
DF-AT

3/2/1999 **9 Oral Arg Advise Ltr Sent**

3/22/1999 **10 Stips: Extend Time – AE Brief**
Extend Until: 5/3/1999
Filed By Attorney: 1111 – CHERRY JAMES
AP/A
For Party: 1 PEOPLE OF MICHIGAN PL-AE

3/23/1999 **11 Submitted On Motion Docket**
Event: 6 Bond
District: G Item #: 30

3/30/1999 **12 Order: Bond – Deny**
Event: 6 Bond
Panel: JPH, WBM, MRS

4/7/1999 **13 Noticed**
Record: REQST Request Mailed: 4/7/1999

4/15/1999 **14 Record Filed**
Comments: FILE 4TR

5/3/1999 **16 Brief: Appellee**
Proof of Service Date: 4/30/1999
Oral Argument Requested: Y Timely Filed: Y
Filed By Attorney: 49413 – MEAD AARON J
For Party: 1 PEOPLE OF MICHIGAN PL-AE

1/4/2000	**21**	**Submitted on Case Call** District: G Item #: 6 Panel: DHS, RSG, GRM
2/25/2000	**21**	**Opinion – Per Curiam – Unpublished** Click here to view document in PDF format. Pages: 4 Panel: RSG, DHS, GRM Result: L/Ct Judgment/Order Affirmed
3/16/2000	**32**	**Motion: Reconsideration of Opinion** Proof Of Service Date: 4/13/2000 Check No.: 1107 Fee: $75.00 Receipt #: 8478 Filed By Attorney: 14978 – HILLS JAMES D For Party: 2 GRIFFIN ROBERT LANELL DF-AT Answer Due: 4/27/2000
5/2/2000	**33**	**Submitted On Reconsideration Docket** Event: 32 Reconsideration of Opinion District: C Item #: 2
5/11/2000	**34**	**Miscellaneous Receipt** Date: 5/11/2000 Check #: 2370 Fee: $15.00 Receipt #: 2167201 Attorney: 43265 – ROSE PATRICK L
5/24/2000	**35**	**Order: Reconsideration – Deny – Appeal Remains Closed** Event: 32 Reconsideration of Opinion Panel: DHS, RSG, GRM
6/13/2000	**36**	**Remittitur & Record Returned – Close Out** *Comments*: LCF; 4TR-BERRIEN
7/6/2000	**37**	**Miscellaneous Receipt** Date: 7/6/2000 Check #: 2407 Fee: $8.50 Receipt #: 2167202 Attorney: 43265 – ROSE PATRICK L

7/6/2000	**38 Miscellaneous Receipt** Date: 7/6/2000 Check #: 2408 Fee: $1.50 Receipt#: 2167203 Attorney: 43265 – ROSE PATRICK L
7/19/2000	**39 Delayed Application for Leave to SCt**
7/21/2000	**40 Miscellaneous Filing**
8/11/2000	**41 Supreme Court – File Sent To** *Comments*: SC #117280
8/15/2000	**42 COA File – Received**
8/18/2000	**43 Trial Court Record Received**
9/21/2000	**44 Miscellaneous Filing**
10/3/2000	**45 Brief in Opposition to SCt Application**
3/27/2001	**46 SCt Order: Deny**
4/5/2001	**47 Supreme Court – File Ret'd By – Close Out**
4/17/2001	**48 SCt Motion: Reconsideration**
4/20/2001	**49 Miscellaneous Filing**
5/1/2001	**50 Answer to Pleading at SCt**
5/16/2001	**51 Answer to Pleading at SCt**
6/26/2001	**52 SCt Order: Denying Motion**

Court of Appeals, State of Michigan

ORDER

People of MI v. Robert Lanell Griffin	E. Thomas Fitzgerald Presiding Judge
Docket No. 254433	Michael J. Talbot
LC No. 98-403728-FH	Patrick M. Meter Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

/s/ E. Thomas Fitzgerald
Presiding Judge

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

Aug. 20, 2004 /s/ Sandra Shultz Mengel
Date Chief Clerk

Order

May 31, 2005

127236

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ROBERT LANELL GRIFFIN,
Defendant-Appellant. /

SC: 127236
COA: 254433
Berrien CC: 98-403728-FH

On order of the Court, the application for leave to appeal the August 20, 2004 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 31, 2005 /s/ Corbin R. Davis
Clerk

MICHIGAN COURT OF APPEALS

Case Number: 254433
PEOPLE OF MI V ROBERT LANELL GRIFFIN

1	**PEOPLE OF MI**	PL-AE	PRS	(49413) **Mead Aaron J** 811 Port St County Courthouse St Joseph MI 49085 269-983-7111
2	**GRIFFIN ROBERT LANELL**	DF-AT	RET	(43265) **Rose Patrick L** 321 Woodland Pass Suite 400 East Lansing MI 48823 517-351-7673

Status: Case Concluded; File Archived **SCT Status:** CLOSE

3/19/2004 **1 Delayed App for Leave – Criminal**
Proof Of Service Date: 3/19/2004
Check #: 690 Fee: $375.00
Receipt #: 2544331
Answer Due: 4/9/2004
Attorney: 43265 – ROSE PATRICK L

3/21/2003 **2 Order Appealed From**
From: BERRIEN COUNTY CIRCUIT COURT
Case Number: 98-403728-FH
Trial Court Judge:
27645 NELSON THOMAS E
Nature of Case:
Relief from Judgment

3/19/2004 **3 Transcript Filed By Party**
Date: 3/19/2004
Reporter: 4617 – SPRINGMAN TERRI L
Filed By Attorney: 43265 – ROSE PATRICK L
Hearings:
9/2/1998
11/6/1998

8/4/2004	**4**	**Submitted On Special Motion Docket** Event: 1 Delayed App for Leave – Criminal District: L Item #:16
8/20/2004	**5**	**Order: Application – Deny – Delayed App for Leave** Event: 1 Delayed App for Leave – Criminal Panel: ETF, MJT, PMM Attorneys: 43265 – ROSE PATRICK L
9/20/2004	**6**	**File Closed-Out**
10/15/2004	**7**	**Application for Leave to SCt**
10/18/2004	**8**	**Supreme Court – File Sent To** *Comments*: SC127236
10/19/2004	**9**	**COA File – Received 10/26/2004**
10/26/2004	**10**	**Trial Court Record Received**
5/31/2005	**11**	**Deny Application/Complaint**
6/1/2005	**12**	**Supreme Court – File Ret'd By – Close Out**

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff,

vs.

Robert Griffin,

Defendant,

Hon. John T. Hammond

File No. 98-403728

MOTION TO SUPPRESS

Angela Pasula, Pros. Atty.
St. Joseph Courthouse
811 Port Street
St. Joseph, Mi. 49085

James D. Hills (P14978)
Attorney for Defendant
425 S. Westnedge
Kalamazoo, Michigan 49007

MOTION TO SUPPRESS EVIDENCE

Now comes Robert L. Griffin, by and though [sic] his Attorney James D. Hills, and for his Motion to Suppress Evidence states as follows:

1. That the Defendant Robert L. Griffin was arrested on August 21, 1998 and charged with Possession with Intent to Deliver 225 grams or more, but less than 650 grams of Cocaine.

2. That on the aforesaid date, your Defendant, was stopped for speeding on I-94 in Berrien County, by a Michigan State Police Officer.

3. That your Defendant was arrested for a suspended Michigan Drivers License. Mr. Griffin, however, was driving with a valid Illinois Drivers License and was living and working in the State of Illinois.

4. The Defendant was asked for his consent to search the motor vehicle. He told the Officer no, however, the Officer searched inside the vehicle without Mr. Griffin's permission. Mr. Griffin was the only person in the vehicle. The vehicle was owned by a relative who lived in Illinois.

5. The Officer having already arrested the Defendant, however, told your Defendant he (the Officer) was not sure he was going to take your Defendant to jail. This was before the search of the motor vehicle and after the Defendant was handcuffed and placed under arrest.

6. The Officer searched the inside of the vehicle and found no illegal items. The Officer then called for the canine unit and the trunk was searched where the cocaine was located.

7. The Defendant was then arrested for the present charge and taken to jail.

Wherefore your Defendant, respectfully requests this Honorable Court to suppress the evidence found as the result of an illegal search and seizure.

Dated: October 9, 1998

By: /s/ James D. Hills
James D. Hills (P14978)
Attorney for Defendant
425 S. Westnedge Avenue
Kalamazoo, Michigan 49007
(616) 344-3811

STATE OF MICHIGAN

IN THE BERRIEN COUNTY
TRIAL COURT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

vs. Case Nos. 98-403728-FY
98-240328-ST
98-409184-ST

ROBERT LANELL GRIFFIN,

Defendant.

VIDEO PRELIMINARY EXAMINATION*

BEFORE THE HONORABLE JOHN N. FIELDS

Saint Joseph, Michigan – September 2, 1998

APPEARANCES:

For the People: MARK SANFORD (P35150)
Assistant Prosecuting Attorney
Berrien County Courthouse
St. Joseph, Michigan 49085
(616) 983-7111

For the Defendant: JAMES D. HILLS (P14978)
425 S. Westnedge
Kalamazoo, Michigan 49007
(616) 344-3811

* * *

[3] St. Joseph, Michigan

September 2, 1998 – at 4:15 p.m.

---

* Any typographical and/or incorrect punctuation found in the following transcript pages were intentionally left to show accurately how the original document appeared.

THE COURT OFFICER: Court will resume, and you may be seated.

This is Docket Numbers 98-403728-FY, 98-409184-ST, and Docket 98-240328-ST. It's the State of Michigan versus Robert Lanell Griffin.

Thank you.

THE COURT: Good afternoon. This matter is before the Court today pursuant to a complaint which alleges

* * *

it is. Possession with intent to deliver 225 grams or more, but less than 650 grams of cocaine.

Sir, are you Robert Lanell Griffin?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay.

And Counsel, would you just identify yourself for the record, please?

MR. HILLS: Thank you. Jim Hills appearing on behalf of Mr. Griffin.

* * *

[4] Mark Sanford is present as counsel for the People.

Mr. Sanford, are you ready to proceed?

MR. SANFORD: We are, Judge.

* * *

MR. SANFORD: Judge, I would call Trooper Coleman.

THE COURT CLERK: Do you solemnly swear or affirm that the testimony you shall give in the matter now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

MR. COLEMAN: I do.

THE COURT: Tell us your name, sir?

MR. COLEMAN: James Coleman.

THE COURT: Please proceed.

JAMES COLEMAN

called at 4:17 p.m. by the People, sworn by the Court Clerk, testified:

DIRECT EXAMINATION

[5] BY MR. SANFORD:

Q. Where are you employed?

* * *

A. Michigan Department of State Police.

Q. And how long have you worked for the State Police?

A. A little over five years.

Q. And in what capacity?

A. As a state trooper.

Q. Were you employed in your capacity as a state trooper on August, 21st of this year, 1998?

A. Yes, I was.

Q. And do you recall what shift you worked that date?

A. Ten-hour shift 6:00 a.m. to 4:00 p.m.

Q. Were you wearing a uniform on that date?

A. Yes.

Q. In a patrol vehicle?

A. Yes.

Q. And did you have a partner?

A. No.

Q. Do you recall where you were on August 21st at about 8:25 a.m. in the morning?

A. I was working Interstate 94 in Lincoln Township.

Q. That be Berrien County?

A. Correct.

[6] Q. And when you say working that area, what do you mean?

A. I was more or less patrolling, working traffic, on the freeway.

Q. And did something catch your eye at that time and place?

A. I was sitting stationery in the median running stationary radar on eastbound traffic and a vehicle came into my zone, activated my radar, obtained a clock of 78 in a 70 mile per hour zone, and pursued it for a traffic stop.

Q. Was traffic heavy that morning?

A. Actually it was light.

Q. And was it light out at this time?

A. Yes.

Q. And could you tell when you initially saw this vehicle and clocked it, what type of vehicle it was?

A. Yes, I could.

Q. Okay. What kind was it?

A. It was an Aurora, an Oldsmobile product green in color.

Q. Remember what year?

A. I believe it was '95.

Q. After getting this clocking on your radar, what did you do?

A. I pursued the vehicle to – to stop it for the speeding infraction and as I was following the vehicle, I noticed a second violation.

Q. What was that?

A. It was a registration plate violation, an improper display.

[7] Q. And can you explain that a little further? What was improper about it?

A. He had a – the dealerships will put trim pieces around license plates to advertise and this particular vehicle had a trim piece around the plate and it blocked the state name, Illinois.

* * *

Q. And the violation being what – state law requires what?

A. That you can readily read any of the – the wording on it and identify the plate, which state it's out of.

Q. Did you have any problems in pulling that car over?

A. No, I did not.

Q. And how many people were inside that car?

A. One individual.

Q. And while pulling that car over did you see any type of movement or gestures, anything of the sort?

A. No, I did not.

* * *

[8] Q. Do you see that person in court?

A. Yes, I do.

* * *

Q. And what happened then?

A. I made contact with the driver, asked him preliminary type questions, advised him why I had stopped him, More or less obtained his driver's license and vehicle paperwork.

[9] Q. And did you run any of that information through LIEN?

A. I did doing the follow-up, yes.

Q. Okay. And were there any problems with that paperwork?

A. He turned out to be suspended in Michigan for having an unsatisfactory driving record.

Q. Now would that suspension have been through the State of Michigan or something that Michigan recognized because of violations that occurred in Illinois.

A. No, it's through the State of Michigan, although he was holding an Illinois driver's license. That's what he provided to me.

Q. Did you run that plate and registration and/or VIN number through the Secretary of State as well?

A. I did later, yes.

* * *

Q. Did you ask the defendant at any point during this preliminary conversation with him about the car, who it belonged to, or any – any of that sort?

A. Yes, I did.

Q. What did he say?

A. He advised that the vehicle belonged to his aunt and he was [10] going to Kalamazoo to pick up his son.

Q. And did he tell you where he was coming from?

A. From the Chicago area.

Q. Chicago?

A. Yes.

* * *

Q. After finding out that the defendant's license was suspended, what did you do?

A. I made contact with him a again, a second time and I arrested him for that violation.

Q. Is that a misdemeanor in Michigan?

A. Yes, it is.

Q. And –

THE COURT: I'm sorry. You arrested him for what, sir?

[11] THE WITNESS: For driving under a suspended record, license.

THE COURT: Okay.

BY MR. SANFORD (continuing):

Q. What was your intention at that point with regards to the defendant? You placed him under arrest. What did you intend to do?

A. I intended to arrest him and then I wanted to search his vehicle.

Q. And by arresting him, did you actually handcuff him, say the words, "You're under arrest," that type of thing?

A. Yes, I did.

Q. And where did you place him –

THE COURT: Did you do both? I heard two different things. Let's clarify that.

THE WITNESS: I advised him that he was under arrest for driving suspended and I did handcuff him.

* * *

A. I first advised him that he was under arrest and that I was going to search his vehicle. I told him I wanted to search [12] the whole vehicle and it – I – specifically I wanted to look in his trunk and he told me I could not.

Q. Told you you could not?

A. Correct.

Q. Did you at some point search the interior of that vehicle?

A. Right after he advised me of that, I did. I searched the interior of the vehicle?

Q. Anything in it?

A. Nothing illegal, no. No contraband.

Q. Any paperwork?

A. There was some paperwork belonging to the registered owner of the vehicle, there were some other items that got my attention.

Q. Like – such as? He had some – there was a large amount of air fresheners in the – in the vehicle. A vanilla scent as recall.

* * *

Q. Well, let's try to put a number on it. Can you tell us approximately how many air fresheners there were?

A. Between five to ten air fresheners were tied down near the, like that emergency brake pedal.

* * *

[13] Q. What else, if anything, did you find in the car?

A. I located a cellular phone.

* * *

A. During the patdown when I had arrested him.

Q. Was that pager on or off, if you know? It was on.

* * *

[14] Q. Why did you want to get into the trunk of this vehicle?

A. I ha – I felt that there were some – some indicators to me from my experience that maybe there was something going on here more than just a trip to Kalamazoo, from what he had conveyed to me earlier that he was coming and picking up his son.

Q. Tell me why. What things were you looking at?

A. My initial contact with him when I was speaking with him, he – when I was asking for vehicle paperwork, he went to his center console to pick up something on the – looking for paperwork and I saw a plastic bag. I had asked him what was in the bag and he held it up and said it was a bag of candy which it was and he advised me, "I don't play that way" [15] which I took as he doesn't play that way –

* * *

THE WITNESS: My opinion from – from that was that he [16] wasn't involved with drugs by holding up the plastic bag 'cause that's what I was inferring –

* * *

Q. Okay. We've got that comment. What else?

A. Once I had taken his driver's license, went back to my patrol car, and began to make my file checks and I learned that he was suspended, the LEIN operator – the radio operator – advised me that there was a case number attached to the suspension and he advised me, "Do you want me to run it?" And I said yes so he ran the case number and it came back and there was a SID number which is involved with people who have been arrested and imprisoned.

Q. State Identification Number?

A. That's correct. So he ran that as well and he advised me that the individual I was dealing with had – was on parole for prior drug offenses.

Q. Now, armed with that information, did you ask the defendant anything about that?

A. Later I did, yes.

Q. And what was his response, if any?

A. He told me I had the wrong person, that he had never been arrested for drugs.

* * *

[17] Q. What – let's stop. What kind of seizures have you had from traffic going eastbound on 1-94?

A. In the last three to four hears, I have had amounts of marijuana to 168 pounds, to 100 pounds, to 58 pounds, to 52 pounds, to 30 pounds, to 13 pounds, to ten pounds and then some smaller amounts.

Q. And is there some significance to the fact that it happened on I-94 and/or eastbound?

A. It's been my experience that contraband, meaning drugs, goes eastbound, whereas the money will go westbound to pay for the shipments.

Q. You mentioned there were other factors. You testified earlier about a cell phone, a pager. Were those factors at all?

A. Yes.

Q. Based on what?

A. It's been my experience that – that drug traffickers will have communication devices so they can keep in touch with [18] their suppliers or whoever they're making their deliveries to and what have you.

Q. What about the air fresheners?

A. It's been my experience that air fresheners are there to mask any odors, be it marijuana or meth or something like that.

Q. And when you said your experience, have you run across air fresheners before?

A. On several occasions with drug traffickers.

Q. And on those occasions, have you actually found drugs in vehicles?

A. Oh, yes.

* * *

A. Quite honestly, the fact that he wouldn't allow me to look in his trunk when I asked. That - that drew some suspicion from me.

Q. What did you decide to do?

A. I advised him, and I had decided, that I was going to call a canine just to build on my case – for my probable cause.

Q. Did you, in fact, do that?

A. I did.

Q. That was through a radio device, I assume?

A. Through a radio operator, I had him contact a canine and [19] Trooper Norvell was contacted and he came to the scene.

Q. Now the report says and you've testified that the stop happened at about 8:25 a.m.?

* * *

Q. And do you recall approximately you would have made this phone call or this communication to get a dog to come there?

A. It would have been about ten minutes after, about 8:35.

* * *

A. Well, it depends. It could take ten to fifteen minutes, but if you're conversing on the radio or with the defendant or what have you, it could take longer.

Q. All right. Did, in fact, Trooper Norvell show up with his dog?

A. He did.

Q. And do you recall about what time that would have been?

A. It would have been about 25 to 30 minutes after the call.

[20] Q. After you initially called him?

A. Correct.

Q. So it would have been – and you called him about ten minutes into the stop I believe you said?

A. Yes.

Q. Okay. Twenty-five to 30 minutes later?

A. Correct.

Q. When Trooper Norvell arrived, was he by himself, by the way, other than his dog?

A. He arrived by himself. Prior to his arrival, my sergeant had arrived to the scene?

Q. Okay. Who was that?

A. Sergeant Joe Zangaro.

* * *

[21] Q. And as a result of the trooper coming there with his dog, did you actually at some point go into that trunk?

A. Yes, I did.

Q. And that was based on your opinion that the dog did what?

A. The dog had indicated positively for – for drugs in the vehicle.

Q. Now you indicated you had searched through the interior of that vehicle prior to the dog getting there?

A. Yes, I had.

Q. Did you find any drugs during that initial search?

A. No, I did not.

Q. Were you relatively thorough or was that a quick search?

* * *

Q. After the dog hit on the car, what did you do?

[22] A. We opened the trunk, looked inside the trunk. There were some items in there and there was a plastic bag right in the left, like, quarter panel. It was sitting in plain – in view. It wasn't buried or hidden or anything. There was a plastic bag.

* * *

A. It was a plastic bag like a – like a plastic grocery sack in place of the paper bags that they provide now. And it was tied in knots and inside of there was another and then ultimately inside of there were plastic zip-lock storage bags, one inside the other, with a white powder substance inside.

Q. How did you get into that trunk?

A. With a ket – actually with the remote, excuse me.

Q. Remote?

A. There was a remote on the keyring.

* * *

Q. And once we finally went through one or two bags, you indicated you saw a bag with white powder?

[23] A. Correct.

* * *

Q. At some point, did you get a rough estimate of a weight of that?

A. Yes, we did.

Q. What was the rough estimate?

A. Five hundred grams.

* * *

[25] Q. During the course of your work as an officer, I assume you run across situations where a vehicle is to be impounded?

A. Yes.

Q. And had you not found this cocaine, what would you have done with this vehicle, if – if the only information you had at that point was the defendant was arrested for driving on license suspended. What would you have done?

* * *

[26] Q. I'm sorry, let me back up and ask my question again. Does your department have procedures dictating when and under what circumstances a vehicle may be impounded?

A. Yes.

Q. In fact, I believe you brought us a copy of those rules today, or at least a partial copy?

A. I did.

* * *

THE WITNESS: It is – it's Official Order Number 49 which covers vehicles when they're being impounded or when they're being towed or what have you.

* * *

Q. And what does that policy tell you in concerns or in regards to vehicles that are stopped on a road when the driver is not allowed to drive it for reasons of suspension or what have you?

A. Well, it – particularly it specifies non-limited freeways [27] on highways.

* * *

A. And in circumstances like that, when you arrest an individual and there's not a valid driver with that individual who can take control of the vehicle, then we have to tow the vehicle. We have to impound it because of the arrest.

Q. And after you impound a vehicle, do you have standard procedures for inventorying that vehicle?

A. Yes, we have to inventory the vehicle, its contents, its containers, everything.

Q. Does that include trunks as well?

A. Yes, it does.

* * *

[28] A. It – it was impounded initially as evidence. We took it back to our post and we held it there.

Q. A tow truck or something or was it driven?

A. It was driven.

* * *

[29] BY MR. HILLS:

Q. Good afternoon, officer.

A. Good afternoon.

Q. I take it – I take it officer that you consider 1-94 a drug corridor. Is that correct?

A. Yes, I do.

Q. And that is the – basically the only major road between Chicago and straight to Detroit, correct? Straight shot.

A. Oh, yes.

Q. Now you stopped the car for speeding. Is that correct, sir?

A. Yes.

Q. You indicated also, I believe, in your testimony that my client's driver's license in Michigan was suspended. Was the suspension up at that time?

A. Was it up as –

Q. Was it time – was the time for the original suspension or any suspension up at the time that you stopped him?

A. The information provided me through our radio operator was that he was suspended until his reinstatement fee was paid.

Q. Okay. So and being an officer of five years, there's a suspension for a certain period of time and then you must pay a reinstatement fee. Is that correct?

A. Correct.

Q. And apparently then the suspension was over except the reinstatement fee was not paid? That would be –

A. Correct.

* * *

[31] Q. Now I take it also that it's not illegal for a black man to be driving someone else's car on I-94 to go from Chicago area to Kalamazoo. Is that correct?

A. No, it's not illegal.

Q. All right. And it's not a criminal violation to be driving down I-94 speeding, is it?

A. No, it's not a criminal violation, no.

Q. And it's not a criminal violation to have a pager, is that right?

[32] A. No, sir.

Q. Do you have a pager?

A. Actually, no.

Q. Anybody in your department have a pager?

A. Several people do.

Q. Do you have a cellular phone in your car?

A. Yes, I do.

Q. On I-94, are there specific signs that say who to call with your – for your page – I mean, for your cellular phone if you need help?

* * *

Q. And I take it then, when he had a valid Illinois license, is that correct?

A. Yes, he did.

Q. And I assume you checked and that's where he does live. Isn't that correct?

A. Yes.

Q. And I assume you checked where he works and he did work there. Is that right?

A. He advised me that he worked at a TicketMaster outlet in the Chicago area.

[33] Q. Did you contact and find out he does have a son in Kalamazoo that he was going to visit?

A. I was never able to verify that, no.

* * *

A. I wouldn't say he was totally cooperative, but he did answer every question I asked him.

Q. Did you ask him for his driver's license?

A. Yes, I did.

Q. Did he give it to you?

A. Yes, he did.

Q. Did you ask him for his registration?

A. I asked him for vehicle paperwork.

Q. Did he give it to you?

A. No, he did not.

Q. Where – did he find it?

* * *

[34] Q. All right. Were there any stolen goods in the car when you searched inside the his car? Not the trunk, but inside the car? Let's take –

A. I – I searched the vehicle, did not find any stolen property.

Q. And there was no possibility that he would destroy any evidence because he was under arrest in your police car, isn't that correct?

A. That's correct.

Q. And there was chance of his flight either, was there?

A. No.

Q. Now I – I try to write down you had some – you felt, those were the words, you felt that it was something wrong, is that right? Is that what you – you said?

A. I had a suspicion.

Q. You used the word felt? I felt this. Did you say that?

A. I might have said felt, yes.

Q. All right. And that was because he was on I-94, he had a pager, he had a cellular phone. Is that correct?

A. That's part of it, yes.

[35] Q. And now we get to the air fresheners. Have you ever stopped any cars without drugs that have air fresheners in them?

A. Sure.

* * *

Q. And you didn't smell any odors in this car, did you?

A. Other than the air fresheners, no.

Q. Didn't smell any marijuana?

A. No, I did not.

Q. Even when you looked in it, isn't that right?

A. Correct.

Q. And in fact, when you placed him under arrest for driving while his license suspended, at that time you were going to search the vehicle no matter what. Isn't that right?

A. Search incident to an arrest, I was gonna search it, yes.

Q. And that was even before you knew he had a pager or he had a cellular phone, wasn't it, because you hadn't even gotten in the car yet at that time?

A. No. I knew he had a pager.

Q. You didn't know he had a cellular phone, did you?

A. Not at that time, no.

[36] Q. And the air fresheners, was he supposed to hang them from the rear view mirror?

A. That would be a violation.

Q. So that – that shouldn't happen, right?

A. No.

Q. So you hang them from someone's – below the windshield. Is that right?

A. That would be a place you could put them, yes.

Q. So it would be out of the way of your driving your vehicle?

A. Yes.

* * *

Q. Now you said to us that you arrested him and you wanted to search the whole vehicle. Is that right?

A. Yes.

Q. And that was before you searched the inside, isn't that true?

A. Correct.

Q. And that was before you decided to call the dogs, is that right?

A. Well, it was about the same time actually.

Q. And this was because it was 8:30 in the morning, that was one of the reasons, is that right?

A. Yes.

[37] Q. And this improper display trim plate, you say dealers do that?

* * *

Q. Did you ever ask him those his drugs?

A. I brought up the drugs were in the vehicle, but I never asked him specifically.

Q. Did you ever ask him were those his drugs?

A. No, I did not.

* * *

[40] Q. Did you do anything else in the car – did you find anything else in the car that you might have asked somebody about?

[41] A. No.

* * *

Q. Now you indicated you called the dog at about 8:35. Was that after my client was arrested?

A. Yes.

Q. When you say he was arrested, was he arrested before he was placed in your vehicle?

A. He was arrested outside of his vehicle for driving suspended.

Q. Okay. And then he was handcuffed and placed in the back of your car?

A. Correct.

* * *

Q. Okay. So it's – he's locked in the back. Is that right?

A. He's locked in the back, yes.

Q. All right. And I believe and I want to be clear that he was the only person in the car and he made no gestures to try and hide anything. Is that right?

A. Correct.

[42] Q. You indicated he said, "I don't give you consent to look into the trunk."

A. Yes.

* * *

Q. And you specifically asked him, "May I search the trunk?"

A. Yes.

Q. And he said no to that again, right?

A. Yes.

* * *

[43] Q. Did the whole conversation between you and my client, was that recorded on audio?

A. I'm certain mostly all of it is, yes.

Q. Did you ever listen to it, sir?

A. Yes,

Q. And do you still have a copy of that?

A. Yes.

Q. Is that in evidence?

A. Yes.

* * *

[44] Q. Now your sergeant arrived about five to ten minutes before the canine unit arrived?

A. Approximately, yes.

Q. And how long approximately did the canine go around the car or whatever the canine –

A. From what I could tell – I was watching primarily traffic – five to ten minutes.

* * *

[46] REDIRECT EXAMINATION

BY MR. SANFORD:

Q. This car belonged to a third party. At some point during your conversation with the defendant, did you ask who drove that car or who had access to the car?

A. He advised me that he and his aunt had access to it.

* * *

[47] (At 5:01 p.m., People's Exhibit 1 marked)

* * *

That's People's Proposed Exhibit 1. I've got defense attorney a copy of this just before the exam today. I would ask if he would object for purposes of this hearing only to the admission of this report and any chain of evidence

problem that – or any chain of evidence, not problems, involved in the matter before you.

MR. HILLS: I have none, your Honor.

THE COURT: All right.

Any objections then in –

MR. HILLS: Oh, no, your Honor.

THE COURT: It is admitted.

(At 5:01 p.m., People's Exhibit 1 admitted)

THE COURT: Attorney Sanford.

MR. SANFORD: Judge, I have no further witnesses.

[48] MR. HILLS: And defense has no witness, your Honor.

THE COURT: Thank you.

You have a motion, sir?

MR. SANFORD: I do, Judge.

By way of bind over, I will be brief. I believe that we have at least two justifications for this officer to get into the trunk of that vehicle over the defendant's consent. The first is the officer's belief under *People versus Terry* that there was something going on here. And we've listed those factors – defendant's comments, the defendant saying that he had no record, was – had not been arrested for drugs when – when the trooper just got through talking to the radio operator that in fact he did have a drug conviction, was in fact on parole. Again, the – the factors about the corridor going along eastbound on 94, presence of pagers

and phones, those air fresheners, the very fact the defendant did not consent to the opening of the trunk. All of those things forming in the officer's mind a reason to detain the defendant longer than just writing him a ticket for that Driving While License Suspended.

At that point, the dog was called and came within 25 to 30 minutes. The dog alerting on that gave the officer probable cause to believe that there were drugs in that vehicle.

[49] I have a case in support of that, *People versus Clark*. It's found at 220 Mich App and let me get the Court the page number of that – page 240, which indicates essentially that a dog's alert is reliable.

THE COURT: Let me just ask and – and I know that Trooper Norvell, I think, just left.

MR. SANFORD: He did just leave, Judge.

THE COURT: In general there is some foundational factors for dog handlers and – and evidence that comes from dogs.

MR. SANFORD: Judge, that is correct and I spoke – that was why I requested that opportunity to talk with the defense attorney. I asked him if for today's purposes, the testimony of this trooper saying that, in fact, the dog did alert was sufficient for him. He indicated – and correct me if I'm wrong – that for today's purposes, that would be fine.

* * *

MR. SANFORD: So – so let me back up, Judge, and put this in some kind of perspective.

The initial stop of the vehicle for speeding was [50] proper. The officer's arrest of the defendant for Driving While License Suspended was proper. The officer detained the defendant for approximately 25 to 30 minutes while waiting for that dog to come. I believe under *People versus Burrell* which is found at 417 Michigan that that slight detention was proper given the articulable suspicions that the officer told us here on the stand today.

Once the dog came, the dog hit on that vehicle, thereby giving the officer probable cause to search the entire vehicle, including the trunk. And again, *People versus Clark* at 220 Michigan Appellate Reports page 240 –

* * *

MR. SANFORD: Okay. And I can just quote from page 243.

"An alert is at least as reliable as many other [51] sources of probable cause and is certainly reliable enough to create a fair probability that there is contraband."

In fact, the facts of *Clark* are very analogous to the – to the facts we have today, Judge.

THE COURT: Thank you.

MR. SANFORD: Based on all of those facts as they developed, the officer had the right to open up that trunk and find the cocaine.

Even if the Court refuses to buy any of those arguments, we have the second justification with the inventory. The officer testified that the defendant did not have his license and pursuant to department policy, he would have had that car impounded – fact, in fact, did have that car

impounded and that would have that vehicle inventory pursuant to that departmental policy. And again, under *People versus Toohy*, and I have a cite for that, too – 438 Michigan page 265, that is all that is required for a vehicle to be impounded and inventoried.

In essence, Judge, the drugs would have been found even if there were no other justification because the car would have been impounded, inventoried, including the trunk. The drugs would have been found in that.

I believe that gets us through all the legal hoops that we're required to make this stop a valid stop. The [52] defendant was only person in the vehicle. Told the officer that only he and his aunt drove it and that he had had control of that vehicle for the last couple days. Also, there was a pair of shoes, men's shoes, and a jacket that the officer testified looked like it probably would have fit the defendant. Concerning – so I believe that establishes possession.

And concerning intent to deliver, the quantity alone – 500 grams – I think actually under the lab report, 506 grams. On – on the quantity alone, Judge, that would support an inference of an intent to deliver.

So, given that long-winded motion, I would ask the case be bound over as charged.

THE COURT: Thank you.

Response, Mr. Hills.

MR. HILLS: Thank you. I'll be very brief, your Honor.

I'm simply going to object to the bind-over at this time. I can argue some of these other things because if the Court binds over, then I want to listen to the tape and a few other things, but I don't think they've shown enough your Honor and without any argument, the Court's heard many of these before. I'll leave it up to the Court.

* * *

[53] THE COURT: I am ready to proceed in this matter.

First of all, let me just clarify. I think when I called this case, I indicated that the charge was Possession With Intent to Deliver 225 Grams or More But Less Than 650 Grams of Cocaine.

* * *

This Court has heard the testimony of Trooper James Coleman of the Michigan State Police and I've also received two exhibits.

First of all, let me just indicate that the item that was located in the trunk, the plastic bag, contained powder that was found to contain cocaine hydrochloride.

* * *

[54] THE COURT: Okay.

There was a stop in Berrien County, Michigan in Lincoln [55] Township on August 21 of 1998 by Trooper Coleman, a traffic stop. He indicates that he was conducting a stationary radar, that he observed the vehicle traveling 78 in a 70. He subsequently stopped that vehicle, an Oldsmobile Aurora, and identified the driver as being the defendant in this particular matter.

The trooper indicates that following radio contact he was advised that the defendant was suspended – his driving privileges in Michigan were suspended. And also the trooper indicated that he believed there was a violation of the motor vehicle code with respect to the registration, plate, and alleged improper display.

Trooper further indicates that he then made a custodial arrest of the defendant.

There was a lot of testimony, and I'm not going to go through each and every item that I – I've written down, but a lot of testimony with respect to what took place after that. There was a search in effect incident to arrest of the area within the interior portion of this Oldsmobile. Nothing out of the ordinary was located. The officer did indicate a variety of other items. Mr. Sanford has identified those, and in effect is alleging that there was reasonable suspicion that criminal activity was afoot including a cellular phone, a beeper or a pager, several air fresheners found near the emergency brake. The past [56] experiences of the office with regard to motor vehicles at that time of the morning, an alleged corridor – drug trafficking corridor of I-94. A variety of items that the officer articulated to indicate in his opinion that there was a reasonable suspicion that criminal activity may be afoot.

The officer then made contact and sought assistance from Trooper Norvell with a drug – a dog to have a search for alleged drugs.

While I've not heard the foundation, there's been a stipulation as to the testimony of Trooper Coleman with regard to his observations and he testifies that after Trooper Norvell arrived with a dog that the dog went around the vehicle for about, I believe he's testified, five to

ten minutes, and that the dog showed an alert for some type of alleged illegal drugs. And as a result, the trunk of the vehicle was opened. And subsequently found within the vehicle were the – was the bag that in turn had other bags and subsequently, according to the lab report, cocaine.

I've got a search – a couple of search and seizure – we've got a search and seizure issue and two basic arguments that are being submitted today as it relates to the alleged legality of those searches, the first being that there was again reasonable a – suspicion that criminal activity was afoot, that was sufficient to allow the detention of the – [57] of the driver in addition to the custodial arrest and for the officer, Trooper Norvell, to arrive. And that with an alleged trained dog and an alleged trained officer handling that dog, that the dog then gave an indication or an alert that – that illegal drugs were found in that vehicle.

I'm citing from *People versus Clark* that the prosecutor has submitted on page 243 again, 220 Mich 240 at page 243, and I'm citing only in part and quote:

> "In *Ludwig supra* the Court examined this issue. The Court began by noting that probable cause means that a fair probability exists that contraband or evidence of the crime will be found in a particular place, the Court then consider the reliability of the canine alert and concluded that such an alert is at least as reliable as many other sources of probable cause and is certainly reliable enough to create a fair probability that there is contraband."

Based upon all of the factors, I find that there was sufficient probable cause and noting that a motor vehicle was involved as well and that obviously a motor vehicle's

very mobile that there was a legal basis for the search to take place without a warrant being issued and I will allow that evidence in.

Additionally, there is an inventory search exception to the general rule that there must be a search warrant issued. [58] There is a requirement that if there is going an inventory search, it must be conducted pursuant to a standard departmental procedure.

There's both United State Supreme Court law and Michigan Supreme Court law with regard to that. *South Dakota versus Opperman* found at 96 Supreme Court Reports 309.2 and *People v. Long* found at 419 *Mich* 636.

People's Exhibit 2 reflects the procedures for the Michigan State Police to conduct an inventory search and one of the time frames in which an inventory search according to that policy of the State Police may be conducted is where a vehicle is – first of all, where there is on y a pa – a driver of the vehicle. No one else is able to remove it. A licensed driver is not immediately to remove the vehicle. Accordingly, if a vehicle is to be left unattended following a custodial arrest, the vehicle shall be inventoried.

While there's not an indication from the officer that immediately he was considering an inventory search, it still appears to this Court that there was a right to conduct an inventory search and subsequently an inventory search would have been conduct – conducted pursuant to department policy. That also would be a justification for the admission of this particular evidence as well.

So on those two grounds, I do allow the admission of the alleged cocaine in this matter.

[59] In addition to those items, there must be a showing that the defendant did possess this particular cocaine and also with the intent to deliver.

As it relates to the intent to deliver, I find that several factors, not the least of which would be the amount of the cocaine would in this Court's opinion, provide probable cause that this was more than just for personal use. In fact, it wasn't for use. That was intended to be delivered to other people, 506.4 grams being involved.

Additionally, the officer's testified that there was, as I've stated earlier, a pager and cellular phone. In and of themselves they're certainly legal items as pointed out by Attorney Hills, but it's kind of like baking a cake. There's certain things or elements in – in a cake that by themselves don't make a cake, but when you put all the – all the pieces together it may result in something else.

And the large amount of cocaine along with a pager along with a cellular telephone and some of the other factors that have been cited give this Court the opinion that it was with the intent to deliver.

As it relates to possession, that becomes a little bit of a closer issue in this particular matter. This is not the vehicle of – belonging to, or at least titled to, the defendant, Mr. Griffin. There is testimony that it was titled to a woman. Mr. Griffin, allegedly indicated that [60] that was his – his aunt and that he had the vehicle for a couple of days. As the trunk was opened there were shoes that in the opinion of the officer were men's shoes along with a coat, although he didn't – the officer didn't indicate that

the – exactly what the size of that coat was, but in general it might fit someone the size of the defendant.

I find that there is sufficient probable cause and I note it's a lesser standard than beyond a reasonable doubt. There is sufficient probable cause to find that the defendant in this matter, Robert Lanell Griffin, did in fact possess the cocaine and based upon the threshold standard of a Preliminary Examination, this Court then does find that there's probable cause to believe that this crime was committed and probable cause to believe that the defendant committed that offense.

Accordingly, I bind the defendant, Robert Lanell Griffin, over for further proceedings. Bond is continued as previously set and it has been posted.

I will now call that case at the Circuit Court level. This is not File Number 1998-403728-FH, the People versus Robert Lanell Griffin.

Sir, are you that person?

THE DEFENDANT: Yes, I am.

MR. HILLS: Stand up.

* * *

STATE OF MICHIGAN

IN THE COURT OF APPEALS

People of the State of Michigan Plaintiff-Appellee	Ct. App. File No. 216720
vs.	Tr. Ct. File No. 98-403728FH
Robert Lanell Griffin Defendant-Appellant	

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APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED

WHETHER THERE ARE REASONABLE GROUNDS TO BELIEVE THE OUTCOME OF THE TRIAL WAS AFFECTED WHEN THE COURT IMPROPERLY ADMITTED TESTIMONY THROUGH THE CHIEF PROSECUTION WITNESS, TROOPER COLEMAN, REGARDING A DRUG COURIER PROFILE AS THAT DRUG PROFILE ALLEGEDLY APPLIED TO MR. GRIFFIN, THEREFORE MR. GRIFFIN'S CONVICTION MUST BE REVERSED?

Defendant-Appellant answers, "Yes."

STATEMENT OF JURISDICTION

Defendant was convicted of felony, to wit: possession with intent to deliver over 225 grams, but less than 650 grams, of cocaine pursuant to MCL 333. 7401(2)(a)(ii)/ 333.7413(2) by a jury on November 6th, 1998. The trial was held in the 2nd Judicial Circuit, Berrian County, Michigan in front of Judge Thomas E. Nelson. Mr. Griffin was sentenced on December 1, 1998 to 20 to 60 years in prison. This was a final judgment of the Circuit court and Defendant now appeals as of right. This Court of Appeals has jurisdiction pursuant to MCR 7.203.

STATEMENT OF FACTS

INCIDENT: August 21, 1998

On August 21, 1998 at approximately 8:20 a.m. Defendant-Appellant, Mr. Griffin (hereinafter referred to as Mr. Griffin), was driving a 1995 Oldsmobile Aurora eastbound along a stretch of I-94 located in Berrien County, Michigan. At said time and place Mr. Griffin was pulled over by Michigan state Trooper James Coleman for

driving 78 mph in a 70 mph zone. (Trial transcript, hereinafter, T., page/line 97/4). Trooper Coleman was working traffic enforcement alone and in uniform. Mr. Griffin dutifully pulled over and produced a valid Illinois drivers license. (T. 142/8) The automobile Mr. Griffin was driving had valid Illinois plates, but did not belong to Mr. Griffin, it belonged to Mr. Griffin's aunt, Patricia Taylor. (T. 141/24 & 142/1). Mr. Griffin explained to Trooper Coleman that he lived in Chicago and borrowed the car to pick up his son in Kalamazoo. (T. 99/7).

Trooper Coleman took Mr. Griffin's drivers license back to the squad car and ran a lien, Trooper Coleman discovered that Mr. Griffin's Michigan drivers license had been suspended due to an unsatisfactory driving record. (T. 99/19) The information that Trooper Coleman had was that Mr. Griffin was suspended until his reinstatement fee was paid. (T. 142/15). In other words, all that Mr. Griffin had to do was pay a reinstatement fee and the suspension would be lifted. (T. 142/25 & 143/1). In spite of this fact, and the fact that Mr. Griffin had a valid Illinois drivers license, Trooper Coleman decided to arrest Mr. Griffin on the misdemeanor charge of driving on a suspended drivers license. (T. 101/10). Mr. Griffin was extracted from the vehicle, handcuffed and patted down. During the pat down trooper Coleman found a pager on Mr. Griffin's person. He also found an address book in Mr. Griffin's back pocket. (T. 124/12). Trooper Coleman also found a Ticket Quest Company business card, which at trial he stated was in the address book. (T. 125/13). Trooper Coleman's trial testimony, however, is not consistent with the police report which he wrote only hours after the arrest. Trooper Coleman's police report indicates the business card was found in the center console of the vehicle, not in the address

book. (T. 146/1). The business card had names and numbers on the back (T. 125/6). After patting down Mr. Griffin, Trooper Coleman locked Mr. Griffin in the back of the patrol car and called for the K-9 unit. (T. 130/10).

Before the K-9 unit arrived, Trooper Coleman searched the automobile and discovered a cell phone in the drivers side door pocket (T. 128/9) and 5 to 10 air fresheners next to the emergency brake. (T. 104/18). Also found in the automobile was $301.00 dollars in cash in the center console (T. 139/25 & 140/1). Trooper Coleman went back to the police car and interrogated Mr. Griffin. During that interrogation Trooper Coleman elicited from Mr. Griffin that he was currently working at Ticketmasters in Chicago. (T. 147/13). At this time Trooper Coleman told Mr. Griffin that he "had an option. And one of the options was, I could write him a ticket, take some bond money and let him go, or I could take him to jail." (T. 138/10).

The K-9 handler, John Norvell, arrived with his dog approximately one half hour after Trooper Coleman made the initial stop. (T. 130/17). The dog "hit" on the trunk. (T. 131/8). The trunk was opened via a keyless entry remote on the key chain. (T. 131/16), inside the trunk the officers found a plastic grocery bag, inside that another plastic bag and inside that, a zip lock plastic bag, (T. 131/17) which contained just over 500 grams of cocaine. (T. 133/23). The troopers packaged the baggies found in the trunk and labeled the packages "protected for prints". (T. 132/17). The trunk, however, was not protected for prints, nor was a lift attempted. (T. 139/5 & 150/24 & 151/1). Also found in the trunk was a collection of rags, an Atlanta Braves jacket and a pair of work boots, which Trooper Coleman characterized as tennis shoes for the jury (T. 134/17). Mr. Griffin was asked directly about the cocaine in the trunk,

Mr. Griffin replied that he did not know anything about it (T. 135/19).

While Mr. Griffin was in custody at the Michigan State Police Post his pager went off 5-10 times. (T. 122/5). None of the numbers were checked, (T. 123/15). Trooper Coleman did not try to contact the mother of Mr. Griffin's son, Misha, even after he found her number in Mr. Griffin's address book (T. 124/17). Also while Mr. Griffin was in custody at the Michigan State Police post, Trooper Coleman made contact with Mr. Evans, Mr. Griffin's cousin and primary driver of the vehicle. (T. 144/6 & 190/18).

PRELIMINARY HEARING: September 2, 1998

In Berrien County this case was assigned to the Drug Court. Circuit Court Judge Fields was assigned to handle the preliminary hearing and Circuit Court arraignment.

Mr. Griffin was arrested on August 21, 1998. The preliminary hearing was held September 2, 1998 in the Berrien County Drug Court before Circuit Judge John Fields. Mr. Griffin was bound over for trial. Immediately after the preliminary hearing Circuit Judge Fields held the Drug Court arraignment and set the case for trial in the Drug Court, before Family Court Judge Thomas E. Nelson, for October 1st and 2nd with a status conference on September 29, 1998. The trial was adjourned once at the request of Defense Counsel until November 5, 1998. The original trial date had been scheduled so soon after the preliminary hearing/arraignment that the transcripts could not be prepared before the original trial date.

TRIAL: November 5, 1998

Trooper Coleman testified to most of the facts contained in the above section. In addition to those facts Lajuana Edmonds was called by the Defense and indicated she and Mr. Griffin have a son in common, Sija, and she was staying at her cousin, Kashawn's, house at the time of the incident. Moreover, Ms. Edmonds indicated that Mr. Griffin was to pick up their son at approximately 10:00 a.m. on August 21, 1998, and when he did not show, she called his pager several times. (T. 182/10). Further, Ms. Edmonds had two phone numbers 373-2810 and 553-4522, (T. 182/4).

Further, Mr. Glen Evans testified at trial and indicated he resides at 3640 Wallace, Riverdale, Illinois. (185/24). Moreover, Mr. Evans testified that he is cousin to Mr. Griffin and has known him all his life. (T. 186/2). Mr. Evans testified that his mother is Patricia Taylor, aunt to Mr. Griffin. Mr. Evans also testified that the automobile involved in this case belongs to him, and is registered in his mothers name. (T. 186/25 & 187/3). Mr. Evans verified that the area code in Chicago is 312. However, the area code for the Ticket Quest Company (business card), 219, is an Indiana number. (T. 188/4). Moreover, Mr. Evans verified that Mr. Griffin lives at Forty Fifth and Lake Park in Chicago, and that Mr. Griffin works at Ticketmaster, not the Ticket Quest Company. (T. 189/3). Also that Mr. Griffin does not own a car and rides the bus or train to work. (T. 190/6) Finally, Mr. Griffin asked to borrow the car so that he may pick up his young son in Kalamazoo, Michigan. (T. 190/22). Mr. Griffin picked the car up on August 20th, 1998, and he was arrested the very next morning, while Mr. Evans' vehicle. (T. 191/3).

Trooper Coleman called Mr. Evans to notify him of the impounded condition of the car. (T. 193/20), Mr. Evans indicates the Atlanta Braves jacket is his along with the work boots. (T. 193/30). Mr. Evans also indicated that the business card marked as exhibit 1 was his, moreover, Mr. Evens testified that the handwriting on the back of the card was his, finally, Mr. Evens stated that he placed the card in the center console, where Trooper Coleman placed the business card in his report. (T. 194/1).

Exhibits:

People's Exhibits

1. Ticket Quest business card (T. 125/10)
2. Address book (T. 127/7)
3. Cell phone & pager (T. 128/9)
4. cocaine & bags, 500 grams (T. 132/13)
5. Lab report (T. 168/17)

Defense Exhibits

B. Work Boots found in the trunk (T. 194/25 & 195/1)

C. Atlanta Braves jacket found in trunk (T. 195/21)

* * *

had a connection to drugs. The Prosecution tried to link the address book to Mr. Griffin having kn[illegible]ledge of drugs, through Trooper Coleman's testimony. He stated he found the Ticket Quest business card (mentioned earlier) in the address book. (T. 125/13). However, this was not only contrary to Trooper Coleman's own police report which was written immediately after Mr. Griffin's arrest, but also

contrary to where Mr. Evans (a sequestered witness) said he placed this card. (T. 145/21-25 & 146/1-7). Mr. Evans testified that he left the card in the center console of the vehicle, (T. 194/10-16) this verifies Trooper Coleman's written report as to the location of the business card in the vehicle. The address book itself did not show any link whatsoever to any knowledge of drugs.

We can now see that there was no physical or direct evidence either in the vehicle, or on Mr. Griffin, connecting Mr. Griffin to any knowledge of the drugs found in the vehicle. The only physical and direct evidence connecting Mr. Griffin and the vehicle, was the undisputed fact that he was driving his Aunt's vehicle from Chicago, Illinois, to Kalamazoo, Michigan. This was to pick up his young son and return for a family gathering. This fact was testified to by not only Mr. Griffin, but also Mr. Evans and Ms. Lavanna Edmonds. (T. 181/24 & 182/1-3).

The only logical conclusion from this evidence was that Mr. Griffin had no idea that the vehicle contained drugs.

The jury would have no basis for a finding of guilt except for the fact that (1) Mr. Griffin was driving the vehicle, (2) the drugs were found in the trunk of the vehicle, and (3) that Mr. Griffin was arrested and on trial for this offense. The jury would have been required to find Mr. Griffin "not guilty" on such facts. Even if the jury found Mr. Griffin "guilty" based on these factors, I am positive any judge in this state would not have permitted such an injustice to prevail.

Therefore, how does the prosecutor take these facts and make it possible for a trier of the fact to return a verdict of "guilty as charged"? This is why I say that

section A through F is intertwined with section G. The only possibility of proving guilt on Mr. Griffin's part would be to link these facts via a drug profile. The drug profile in this case would use the specific facts to fit a typical drug dealer or courier. Now we are getting into the use of drug profile for the sole purpose of making such facts substantive proof of Mr. Griffin's guilt.

This of course is prohibited as stated in sections A through F as previously discussed. It also provides this Court with clear and convincing evidence that the prohibited use of drug profile evidence in this case is not merely harmless error.

H. Conclusion

Mr. Griffin has always maintained his innocence and denied any knowledge of the cocaine found in the vehicle's trunk. (T. 135/19-20). There can be no doubt in anyone's mind, after a complete review of this case, that it was entirely based on circumstantial evidence. Further, that the circumstances themselves would have led to only one conclusion, to wit, not guilty. However, with the trial court permitting the use of drug courier profile evidence, over Defense Counsel's objections, the court made it not only possible, but probable, that the jury would convict Mr. Griffin. Then to compound the error, the court failed to give the necessary cautionary instructions to stem the jury's improper use of the drug courier profile testimony. This was not harmless error, and as a result there was a reasonable probability that the error affected the outcome of the trial. Therefore, the reversal of Mr. Griffin's conviction is required.

When a prosecutor brings a case based on minimal circumstantial evidence, and there is a complete lack of physical or direct evidence showing guilt, then the prosecutor must not be permitted to use drug courier profile testimony, as substantive evidence. In this case the Prosecutor used drug courier profile testimony, as substantive proof of knowledge, to raise the level of his weak circumstantial case, in order to gain a conviction. This type of injustice must not prevail.

RELIEF REQUESTED

It is respectfully requested that this Honorable Court reverse the decision in the trial court, or in the alternative, reverse and remand the case for a new trial, or further proceedings which this Court deems appropriate.

Dated: February 27, 1999

/s/ James D. Hills
By: James D. Hills (P14978)
Michael D. Hills (P58571)
Attorneys for Defendant-Appellant
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STATE OF MICHIGAN

IN THE COURT OF APPEALS

People of the State of Michigan Plaintiff-Appellee	) Ct. App. File No. 216720) Tr. Ct. File No. 98-403728
VS.	)
Robert Lanell Griffin Defendant-Appellant	)

Angela Pasula, Prosecuting Attorney Courthouse 811 Port Street St. Joseph, MI 49085	James D. Hills (P14978) Attorney for Defendant-Appellant 425 S. Westnedge Kalamazoo, MI 49007

APPELLANT'S FIRST AMENDED MOTION FOR REHEARING

By: James D. Hills
Michael D. Hills
Attorney for Defendant – Appellant
425 S. Westnedge
Kalamazoo, MI 49007

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I. THE COURT OF APPEALS DID NOT CONSIDER THE FACT THAT DEFENSE COUNSEL STIPULATED TO THE FACTS WHICH THE PROSECUTOR USED TO BRING IN THE DRUG COURIER PROFILE EVIDENCE, THEREFORE THERE WAS NO NECESSITY TO USE DRUG PROFILE EVIDENCE FOR ANY PURPOSE OTHER THAN SUBSTANTIVE EVIDENCE OF GUILT.

II. THE COURT IMPROPERLY INTERPRETED THE CURRENT STATE OF THE LAW AS IT APPLIES TO JURY INSTRUCTIONS AS THEY RELATE TO DRUG COURIER PROFILE EVIDENCE.

Relief Requested 10

INDEX OF AUTHORITIES CITED

Michigan Court Rules

MCR 2.119(F)(3)
MCR 7.203
MCR 7.215(G)
MCR 7.507(A)

Michigan Rules of Evidence MRE 401

Statutes

MCL 333.7401(2)(a)(ii)
MCL 333.7413(2)

Cases Cited

People v. Hubbard, 209 Mich App 234 (1995)
People v. Murray, 234 Mich App 46 (1999)

STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS COMMITTED PALPABLE ERROR BY NOT CONSIDERING THE FACT THAT DEFENSE COUNSEL STIPULATED TO THE FACTS WHICH THE PROSECUTOR USED TO BRING IN THE DRUG COURIER PROFILE EVIDENCE?

Appellant answers: Yes.

WHETHER THE COURT IMPROPERLY INTERPRETED THE CURRENT STATE OF THE LAW AS IT APPLIES TO JURY INSTRUCTIONS AS THEY RELATE TO DRUG COURIER PROFILE EVIDENCE?

Appellant answers: Yes.

STATEMENT OF JURISDICTION

Defendant was convicted of felony, to wit: possession with intent to deliver over 225 grams, but less than 650 grams, of cocaine pursuant to MCL 333.7401(2)(a)(ii); MCL 333.7413(2) by a jury on November 6th, 1998. The trial was held in the 2nd Judicial Circuit, Berrian County, Michigan in front of Judge Thomas E. Nelson. Mr. Griffin was sentenced on December 1, 1998 to 20 to 60 years in prison. This was a final judgment of the Circuit court and Defendant appealed that decision to this Court as of right. This Court issued an unpublished opinion affirming the Circuit court conviction on February 25th, 2000. Defendant now seeks a re-hearing on this Court's opinion. This Court has jurisdiction to order a re-hearing pursuant to MCR 7.215(G).

Defendant filed a motion for re-hearing on March 16th, 2000. Defendant received a letter from the Court of

Appeals dated April 6th, 2000. Said letter indicated Defendant's motion contained too many pages and that Defendant had 14 days in which to file an amended motion for re-hearing.

STATEMENT OF FACTS

Incident: August 21, 1998

On August 21, 1998 at 8:20 p.m. Defendant-Appellant, Mr. Griffin, (hereinafter referred to as Mr. Griffin) was stopped on eastbound I-94 in Berrian County for speeding by Trooper Coleman. (trial transcript page/line 97/4). Mr. Griffin had a valid Illinois driver license, and was driving his aunt's vehicle (141/24 & 142/1) on his way to pick up his son in Kalamazoo, MI.

Trooper Coleman arrested Mr. Griffin for suspended Michigan driver license. Mr. Griffin was patted down and on his person was a pager and an address book. (124/2) Also located in the vehicle was a Ticket Quest business card (125/13), cell phone, $301.00 dollars cash and 5-10 air fresheners by the emergency brake. (128/9; 104/18; 139/25; & 140/1).

A K-9 unit was called and the dog "hit" on the trunk (131/8). Inside the trunk was an Atlanta Braves jacket, work boots, rags and over 500 grams of cocaine. (133/23; 139/5; 150/24; & 151/1). Defendant's fingerprints were not located either on the trunk nor anywhere inside the trunk.

At the trial Mr. Glen Evans, Mr. Griffin's cousin, testified that the Braves Jacket and boots were his and, although the car was registered to his mother, it was actually his car and he was the primary driver. (186/25; 144/6 & 190/18). Mr. Griffin borrowed the vehicle the night

before to pick up his son in Michigan the next morning, as Mr. Griffin does not own a vehicle. (190/22 & 189/3). Also, Mr. Griffin works for Ticket Master in Chicago, not Ticket Quest in Indiana. (189/3).

Finally, Mr. Griffin denied any knowledge of the cocaine located in the trunk. (135/19).

The only issue at trial was whether the Defendant had knowledge of the coc ine in the trunk.

ARGUMENT

A. Standard of Review

The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the appeal must result from correction of the error. MCR 2.119(F)(3).

B. Court failed to address Defense "Stipulations" in the opinion.

This Court in it's opinion has cited two prior Michigan cases relating to drug courier profiles, to wit People v. Hubbard, 209 Mich App 234 (1995); and People v. Murray, 234 Mich App 46 (1999). These two cases set forth the four basic factors in determining the admissibility of drug profile evidence. These factors are set forth in italics (page 2 of the Court's opinion)

This Court was correct when it stated "that the sole issue material to Defendant's guilt or innocence was whether he had knowledge of the cocaine found in the trunk of the car" (pg 2 of Court's opinion). However, this Court made a grievous error in assuming that the other

factors leading up to the discovery of the drugs, to wit trooper's actions in furthering the investigation, search for drugs, drugs found on the vehicle, the quantity, the intent to sell said drugs, and Defendant was driving his aunt's car was in dispute. The Defense stipulated to the legality of the Trooper's search of the vehicle, that Defendant was driving, that drugs were found in the vehicle, that the amount was consistent with an intent to sell (trial transcript pg. 106 & 107, 111).

These stipulations eliminated the need of any drug courier profile evidence to be admitted to show why the trooper searched the vehicle. There was no issue as to why he continued his search following the defendant's arrest, again the Defense stipulated to the validity of the search. There was absolutely no need for the jury to speculate as to the troopers actions, as cited by this Court (pg 2 of Court's opinion), in justifying the use of drug profile evidence. Likewise, it was unnecessary for such evidence to be admitted simply because the Defendant was the sole occupant of the motor vehicle at the time he was stopped, as this was also not disputed. There is no legitimate purpose for such evidence other than to infer the Defendant's guilt.

This Court correctly states that no cautionary instruction was given in this case, This court seems to place the burden on the Defense to request such an instruction, when this Court in People v. Murray, 234 Mich App 46 (1999), and cited in this Court's opinion on page 3, places that burden on the trial court to instruct the jury with regard to the proper and limited use of profile testimony, This Court then went on to state its "merely one consideration in the determination of the admissibility of the

disputed evidence." However, this consideration along with everything else now makes it next to impossible for a jury to view this profile evidence as anything but substantive evidence of guilt.

Summary

Defendant believes that this Court, in it's [sic] opinion, failed to address the Defense stipulations, which eliminated the necessity for drug profile evidence. The majority of the Court's opinion centered on the admissibility of drug profile evidence for proper purposes, without considering Defense Counsel's stipulations. The "proper purposes" for which the prosecutor brought in the drug profile evidence were stipulated to bringing this Court to the language of *Murray supra*. In *Murray* the court stated that drug courier profile evidence is inherently prejudicial, *Id.* at 53, since there was no argument as to what the drug courier profile evidence was being used to show, ie, Valid Search etc., the probative value was out weighed by the prejudicial effect MRE 401. *Murray* dictates that the drug courier profile evidence is inadmissible in this case.

It is Counsel's belief that if this Court reviews this case with Defense Counsel's stipulations in mind, this Court will overturn its decision and correct a palpable error.

Relief Requested

Defense Counsel prays that this Honorable Court grant a rehearing, or summarily overturn it's prior decision.

/s/ James D. Hills
James D. Hills (P14978)
Attorney for Defendant-Appellant

Thursday, April 13, 2000

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF BERRIEN

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -vs- ROBERT LANELL GRIFFIN, Defendant. /	Berrien Circuit No. 98-403728 Hon. Thomas E. Nelson Prior Michigan Court of Appeals No. 216720 Prior Michigan Supreme Court No. 117280

MOTION FOR POST-CONVICTION RELIEF UNDER MICH. COMP. L. § 770.2 OR ALTERNATIVELY MCR 6.500 ET SEQ

(With Supporting Brief, Proof of Service – DATED 6/23/02, and Appendix)

PREPARED BY:
Patrick L. Rose (P-43265)
Attorney for Petitioner (Defendant) Robert Griffin
230 N. Washington Sq.
Suite 306
Lansing, MI 48933
(517)482-2422

NOW COMES the Defendant, **ROBERT GRIFFIN** by and through his attorney **PATRICK L. ROSE**, AND moves this Court to grant leave relief from judgment in this matter based on the following:

1. Defendant was originally convicted in the Berrien County Circuit Court of possession with intent to deliver more than 225 (but less than 650) grams of cocaine. MCL 333.7401(2)(a)Iii) [sic]; MSA 14.15(7401)(2)(ii). He was

sentenced as a second offender to a sentence of twenty to sixty years incarceration. MCL 333.7413(2)(a)(ii); MSA 14.15(7413)(2).

2. This case was presided over by the Hon. Thomas E. Nelson.

3. At trial and at the original appellate level, the Defendant was represented by James D. Hill, 425 Westnedge, Kalamazoo, MI 49007. The undersigned was retained after the affirmance of the Defendant's conviction and represented the Defendant on rehearing in the Michigan Court of Appeals and on appeal to the Michigan Supreme Court.

4. The Petitioner (Defendant Robert Griffin) has assembled and filed with the Court copies of the pertinent documents from the Defendant's original appeal have been provided to this Court to this Court in the attached Appendix. These include the Defendant's Brief on Appeal to the Michigan Court of Appeals (App. 225a), the People's Brief (App. 254a), the decision on the merits (App. 285a), the rehearing pleadings (App. 289 et seq), and the pleadings filed in the Michigan Supreme Court (App. 314a).

5. There have been no federal habeas corpus actions or prior post-conviction proceedings in this matter. MCR 6.502(C)(9).

6. The undersigned requests this Court to grant post-conviction relief based for reasons set forth in the attached brief. The following are the point headings raised in that motion:

I. THE TRIAL COURT ERRED IN THE ADMISSION OF THE TESTIMONY OF GLEN EVANS' FIFTH AMENDMENT TESTIMONY AT TRIAL WHERE THE PROSECUTOR SOUGHT TO DRAW POSITIVE INFERENCES OF DEFENDANT'S GUILT FROM IT, ABSENT A GRANT OF IMMUNITY TO ALLOW DEFENDANT GRIFFIN TO CONFRONT HIS ACCUSER, AND WITHOUT A CAUTIONARY INSTRUCTION SINCE THAT VIOLATES HIS SIXTH AMENDMENT AND MICHIGAN CONSTITUTIONAL RIGHTS OF CONFRONTATION AND DUE PROCESS

II. THIS COURT SHOULD REVERSE BASED ON THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS ABOUT THE INFERENCES TO BE DRAWN FROM THE FIFTH AMENDMENT TESTIMONY OF GLENN EVANS, A POTENTIAL SUSPECT WHO MAY HAVE OWNED THE DRUGS, AND WHOSE SILENCE INCRIMINATED HIM.

III. THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF DRUG COURIER TESTIMONY BY TROOPER COLEMAN THAT LINKED MR. GRIFFIN TO THE DRUGS IN THE TRUNK THE LACK OF RELIABILITY IS CLEAR GIVEN THAT DRUG COURIER PROFILE ANALYSIS DOES NOT PROVIDE A RELIABLE BASIS TO LINK MR. GRIFFIN TO THE DRUGS BASED ON A MATCH BETWEEN HIS INNOCENT CONDUCT AND THE

PROFILE, SO THAT ITS ADMISSION VIOLATES THE RULE IN PEOPLE V. HUBBARD, AND REQUIRES A NEW TRIAL, AND THE DEFENSE COUNSEL ERRED TO PRESENT EXPERT WITNESS TESTIMONY TO REBUT TROOPER COLEMAN'S UNRELIABLE LAY AND EXPERT OPINION TESTIMONY REGARDING THE ALLEGED LINK BETWEEN ROBERT GRIFFIN'S CONDUCT AND THAT OF A DRUG DEALER, AND IN FAILING TO SEEK A LIMITING INSTRUCTION AND IN FAILING TO OBJECT TO ADMISSION OF THE TESTIMONY BASED ON THOSE FACTS UNDER MRE 401, MRE 403, MRE 701, MRE 702 OR MRE 703 AND IN FAILING TO OBJECT TO THE ADMISSION OF EVIDENCE THAT THE DEFENDANT WAS ON PAROLE.

IV. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S DIRECTED VERDICT MOTION, AND THIS SAME COURT SHOULD GRANT A NEW TRIAL TO PREVENT A MISCARRIAGE OF JUSTICE, SINCE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PERMIT A RATIONAL TRIER OF FACT TO FIND EACH ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT.

V. THIS COURT SHOULD REVERSE BASED ON THE CUMULATIVE ERRORS COMMITTED AT TRIAL AND, THE FACT THAT NONE OF THE

ERRORS CAN BE DEEMED TO BE HARMLESS

VI. DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN THESE ISSUES WERE NOT RAISED ON HIS INITIAL APPEAL.

VII. THE INTEREST OF JUSTICE STANDARDS OF MICH. COMP. L. § 770.1 AND 770.2 PERMIT THIS COURT TO GRANT A DELAYED MOTION FOR NEW TRIAL AT ANY TIME IN THE INTEREST OF JUSTICE AND THIS SUBSTANTIVE RIGHT CONTROLS IN THIS CASE OVER THE PROCEDURAL RULES CONTAINED IN MCR 6.500 *ET SEQ* LIMITING POST-CONVICTION TO CASES WHICH A CRIMINAL DEFENDANT CAN DEMONSTRATE CAUSE (OR ACTUAL INNOCENCE) AND ACTUAL PREJUDICE.

VIII. THE GOOD CAUSE REQUIREMENTS OF MCR 6.508(D)(3) SHOULD BE WAIVED BECAUSE THERE EXIST A SUBSTANTIAL POSSIBILITY THAT THE DEFENDANT IS INNOCENT.

7. The Petitioner (Mr. Griffin) has addressed in a supported brief, whose factual allegations and legal arguments are hereby incorporated in this Motion by reference, the grounds for relief from judgment; and, asks this Court to grant a new trial based on the motion and brief, as well as other relief.

* * *

RELIEF REQUESTED

WHEREFORE, Defendant prays this Honorable Court to grant the following Relief as required:

1. Require the prosecutor to answer this petition;

2. Order an evidentiary hearing, as required by *People v. Ginther* hearing, and by U.S. Supreme Court decisional law, and by the Sixth Amendment to the U.S. Constitution, where this Court hears evidence needed to grant relief:

(A) Testimony from Mr. Griffin's expert that the drug courier profile is inapplicable;

(B) Testimony showing why Mr. Griffin was denied his right to effective assistance of trial and appellate counsel;

(C) Testimony from Glenn Evans after he is subpoenaed and can testify;

(D) Testimony from Defendant Griffin's police expert on drug courier profile testimony to show what testimony could be offered to rebut Trooper Coleman's drug courier profile testimony, and to use it in an exculpatory manner;

(E) Testimony from an expert attorney called by Defendant Robert Griffin to show why he was given ineffective assistance of counsel, and why the errors of his trial counsel were not strategic or harmless;

3. After full consideration, grant Defendant relief from judgment and order a new trial where:

(A) Mr. Evans is granted immunity and is permitted to testify or at minimum where the prosecution is barred from arguing that the witness's invocation of his right remain silent should be applied against Mr. Griffin;

(B) Where Trooper Coleman is barred from offering drug courier profile testimony or at minimum where the jury is permitted to hear from defense experts who the drug courier profile was misapplied in this case.

4. Permit the filing of the attached brief;

5. Grant hearings or other relief the Court deems necessary and proper in the premises;

—Respectfully submitted,

Dated: June 20, 2002

Patrick L. Rose – P43265
230 N Washington Sq Ste 306
Lansing, MI 48933-1312

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF BERRIEN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

ROBERT LANELL GRIFFIN,

Defendant.
/

Berrien Circuit
No.98-403728
Hon. Thomas E. Nelson

Prior Michigan Court of Appeals No. 216720

Prior Michigan Supreme Court No. 117280

PETITIONER (DEFENDANT) ROBERT GRIFFIN'S

BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT

(With Supporting Brief, Proof of Service – DATED 6/23/02, and Appendix in Support)

PREPARED BY:
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PETITIONER (DEFENDANT) ROBERT GRIFFIN'S BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT

(Oral Argument Requested)

STATEMENT OF FACTS

A. Procedural History

Robert Griffin was convicted by a jury of possession with intent to deliver greater than 225 but less than 650 grams of cocaine as a sex offender, M.C.L. § 333.7401(2)(a)(ii);, M.C.L. § 333.7413(2).. He was sentenced to a term of twenty (20) to sixty (60) years. His appeals to the Michigan Court of Appeals and Michigan Supreme Court were denied. The undersigned was counsel to Mr. Griffin in the Supreme Court only – having been retained after the Court of Appeals heard an appeal filed by his former trial counsel and denied it. The Michigan Supreme Court denied leave to appeal on March 28, 2001 and the motion for rehearing on June 26, 2002.

B. The Trial

Richard Griffin was stopped on I-94 in Lincoln Township (Berrien County) by Officer James Coleman who was working a one-person radar unit on the freeway, (see Prosecutor's Opening Statement, Transcript, p. 96-97, App 81a-82a; Trooper Coleman's Trial Testimony, Transcript, page 96-97, App. 82a). At the time that he made the stop, Coleman testified that Mr. Griffin was driving 78 miles an hour down the freeway, (See Prosecutor's Opening Statement, Transcript, 88, App. 74-74 [sic]; Trooper Coleman's Testimony at page 97, App. 82a). Mr. Griffin was alone in a

1995 Olds Aurora and freely pulled over in response to officer's signal, (See Trooper Coleman's Testimony at page 97, App. 82a).

Mr. Griffin presented had [sic] a valid Illinois driver's license, but didn't have paperwork for the car, (Coleman at 98, App. 83a). The car was registered to a "Patricia Taylor" in Illinois, The Officer testified that Mr. Griffin stated that Patricia Taylor was his aunt and that only Mr. Griffin and his aunt drove the vehicle, (Coleman at 128, 142, App. 100a, 114a). Attempts to get the officer [sic] to admit that he also knew that Glenn Evans drove the car were futile, (Coleman at 153, App. 128a). During the officer's initial encounter with the Robert Griffin, the officer saw the top of a zip lock baggie in the center counsel [sic] of the car when Mr. Griffin was hunting for the registration. When the officer asked Mr. Griffin what the baggie was, Mr. Griffin showed the bag to the officer which contained some candies. Mr. Griffin stated to the officer that "he didn't play that way," (Coleman at 103, App 88a). No objection was interposed to this question, but the trial court barred the officer from offering his spin on what the statement meant, Id.

The officer took the information back to his car and ran it through the LEIN system. The LEIN system stated that the Robert Griffin's Michigan driver's license was suspended for a poor driving record, (Coleman at 100, App. 85a).[1] Officer Coleman testified that Mr. Griffin had an

[1] This was significant because an individual arrested for driving on a suspended license is guilty of a civil infraction and cannot be arrested. The officer testified that an exception exists for an out-of-stater where the officer has the discretion to take the individual to station to post a bond, (Coleman at 143, App. 115a).

OCA number assigned to him. An OCA number is a tracking number indicating that another police agency was tracking the individual's traffic stops, *Id.* There was no objection to this question. The Officer testified that the Robert Griffin's driver's license while valid in Illinois, was not valid in Michigan, (Coleman at 101, App. 86a) On cross-examination, the officer testified that all the points had dropped off and that Mr. Griffin could have his Michigan license reinstated for a simple payment of a reinstatement fee, (Coleman at 142). At that time, the Officer made a decision to arrest the Robert Griffin, executed a pat down incident to the arrest and found a pager together with an address book, (Coleman at 101, App. 86a).

During the course of the Officer's inspection of the car, the officer noted that the car was registered in the name of a third person, Mr. Griffin had a beeper and a pager,[2] that the car had an unusual amount of air fresheners tied together by the emergency brake, and that Mr. Griffin had a business card with odd notes on the back of it, (Pros Opening 90, App. 75a; Coleman at 104; App. 89a).

Over defense objection, the officer was permitted to testify that in his experience, numerous air fresheners were associated with drug dealers, (Coleman at 105; App. 90a). Defense counsel made extensive arguments why this drug courier profile testimony should not be allowed. The defense was given a continuing objection to this line of testimony, Id at 117. At various points, the prosecution attempted to suggest that the air fresheners were placed

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[2] The officer later testified that in his opinion, cell phones and pagers were indicative of drug dealers. The officer later admitted that most people in Chicago had both cell phones and pagers, (Coleman at 150, 158, App. 122a-130a).

in a suspicious place, but on cross-examination, the officer admitted that they could not legally be dangling from the mirror, (Coleman at 154, App. 126a). Officer Coleman testified that he didn't know how old the fresheners were, what their life span was, or whether they even still worked, Id.. On cross-examination, the officer also admitted that people rarely look in the trunks of cars that they borrow, (Coleman at 158, App. 98a).

The officer also testified at length that it was suspicious to have cell phones and pagers, Id. (It is important to note that Trooper Coleman never attempted to use the cell phone and could not determine whether it had roaming capabilities in Michigan).[3] $301 was also found, but he was inconsistent about whether the money was found in the passenger compartment of the car on [sic] Robert Griffin's person.

The officer also testified that Mr. Griffin told him that he worked at Ticketmaster in Chicago, but had a business card for an individual who worked at "Ticket Quest" in Indiana, (Coleman 149, App. 121a).[4] On the back of the card were a series of names and numbers running from 420 through 3000, Id. At 126. Over defense objection, the officer was permitted to testify that he believed that it was amounts of money, Id. The business card was found in the Robert Griffin's address book.

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[3] This is not as unusual as it might seem. Prepaid cell phones often roam on different networks and some cellular networks do not operate out of their home areas. *See, e.g.* http://www.cricketcommunications.com/faqs.asp#2.

[4] Glenn Evans testified that the card was his, (Evans at 194).

Mr. Griffin told the Officer that he had the wrong man and that he never lived in Michigan, didn't have a Michigan license, and that he was not on parole, (Coleman at 138, App. 110a). These statements were made when the officer told him about the suspended driver's license record for a Richard Griffin from Kalamazoo (with his date of birth) who was on parole, (*Id.*; Pros Opening at 91, App. 76a). The officer decided to detain Mr. Griffin and called for a "drug dog" which alerted positively to the car, (Coleman at 131).

Utilizing this, the officer opened the car trunk, found a shopping bag by the left wheel well which was tied shut. He opened the bag and another bag and found cocaine. (Coleman at 131, App. 103a).[5] Mr. Griffin was arrested and charged with the instant offense. No fingerprints could be lifted from the bag. The prosecution and police explained that this was due to the fact that several police officers handled the drugs with their bare hands, (Pros Opening at 92, App. 77a; Coleman at 139, App. 111a). Police also found an Atlanta Braves jacket and some tennis shoes (later determined to actually be work shoes) in the trunk of the car, (Coleman at 134, 146). The officer testified that they looked like they would fit the Robert Griffin, Id.[6] They also found some car cleaning type equipment in the trunk, (Coleman at 135, App. 107a).

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[5] Note that the prosecutor during his opening statements incorrectly referred to the bag as a duffle bag, (Pros Opening at 91, App. 76a)

[6] The Glenn Evans testified that the clothing was his. He also testified to a number of innocent items in the car that the officer did not mention and testified that there were miscellaneous cards in the car, (TT 193, App. 147a).

While Mr. Griffin was in custody, his pager continuously went off in the police property room and the police went and played the numbers out of the beeper. These numbers corresponded to different numbers in the Kalamazoo area, (Coleman at 123, App. 95a). The police never called these numbers to investigate who was calling. The prosecutor juxtaposed these multiple numbers of unknown origin with Robert Griffin's explanation that he was in Kalamazoo to pick up his child for the weekend, *Id.* Defense counsel did not object to this argument or make any argument about the police failure to investigate or about the unknown origin of the calls. Defense counsel also did not call any family members to testify about Mr. Griffins' family and acquaintances (in the Kalamazoo area) who called Mr. Griffin. The officer denied stating at the police station that he told someone over the phone that he was unsure whether to charge Mr. Griffin or Mr. Evans with the offense, (Coleman at 144, App. 116a)..

A prosecution expert witness testified at trial regarding the street value of the drugs and that anyone who has that much cocaine, intends to sell it, (Lang 163). The value was $10,000 wholesale; $20,000-$30,000 retail, (Lang at 172). The prosecutor then tried admitted evidence (over objection) that larger dealers carry pagers and cell phones. This line of questioning was shut down by the judge, but after the jury heard the answer, Id. At 172-173. It should be noted that at TT 179-184 (App. 133a-138a), there was discussion of lost testimony where the parties stipulated outside the presence of the jury what the testimony was, Id.

The other likely suspect in the case was Glenn Evans. Mr. Evans was Robert Griffin's cousin and was unemployed at the time, (Evans at 186, 197, App. 140a, 151a).

He lived with his mother Patricia Taylor and his stepfather, Id. Mr. Evans testified that the Aurora belonged to him even though it was titled in his mother's name, (Evans at 187, 190, App. 141a, 144a). Mr. Evans testified to loaning the car to Mr. Griffin on the day in question so that Mr. Griffin could drive to Kalamazoo to visit with his son, Id. The witness plead [sic] the Fifth Amendment when questioned about ownership of the bag, (Evans at 186, 205, App. 140a, 159a). Ultimately, the Defendant was convicted as charged and appealed of right, [sic] (App. 221a).

C. The Appeal

In the Defendant's brief on appeal to the Michigan Court of Appeals, his trial attorney raised one issue challenging the admission of drug courier profile, (App. 225a). On February 25, 2000, the Court of Appeals affirmed the Defendant's conviction in an unpublished opinion, (App 309a). Up to this time, the Defendant was represented by Mr. Hill. Following the Defendant's conviction in the Michigan Court of Appeals, he retained the undersigned as his appellate counsel, Counsel timely moved for rehearing in the Court of Appeals. Rehearing was denied on May 24, 2000. Defendant's timely application for leave to appeal was denied by the Michigan Supreme Court, along with his motion for rehearing (App. 314a). This petition follows with new grounds for granting relief, including a new trial, as set forth below in Issues I-VIII.

* * *

VI. DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN THESE ISSUES WERE NOT RAISED ON HIS INITIAL APPEAL.

As was demonstrated in the prior issues, counsel mysteriously jettisoned meritorious issues for no discernable reason. As has been demonstrated, the issues were exceptionally strong and most likely would have prevailed on appeal. Counsel's failure to present these issues constituted ineffective assistance of counsel *Evitts v Lucey,* 469 US 387, 105 S Ct 530, 83 L Ed 2d 821 (1985); US Const Am VI.

In *Kimmelman v Morrison,* 477 US 365, 106 S Ct 2574, 91 LEd 2d 305 (1986), the United States Supreme Court found that failure of an attorney to pursue a Fourth Amendment violation claim on appeal could be reviewed in federal habeas corpus proceedings, *even though federal courts will normally refuse to hear habeas corpus cases involving search and seizure questions.* Under *Kimmelman,* a Defendant must prove that counsel's failure to raise a Fourth Amendment claim was not based on strategic considerations and further that had the motion been granted a different result was likely. There, the Court explicitly rejected the State's argument that counsel's failure to challenge the validity of the seizure of evidence was based on strategy, where the record showed that counsel was unaware that the Government was going to introduce the evidence, and this lack of awareness was predicated on counsel's failure to engage in adequate pretrial discovery was objectively unreasonable. 477 US at 385. The Court further found that counsel's ignorance of the applicable law further justified this result. Counsel's

actions in failing to investigate or research the case was not "trial strategy." (Citations omitted).

While *Jones v Barnes* allows an appellate attorney to withhold issues, this decision must be done as part of the exercise of "sound professional judgment of counsel." *Haskins v Lecureux*, 16 F3d 1219, 1219 [sic] (CA 6, 1994). In reaching this decision, the reviewing court must look at the issues raised and the issues waived. *Ellis v Lynaugh*, 873 F2d 830 (CA 5, 1989). In this case, none of the issues raised in the case would have conflicted with the arguments which were raised on appeal. There is absolutely no conceivable reason consistent with sound appellate strategy why this issue was not raised on appeal.

In *People v Carrick*, 220 Mich App 17, 558 NW2d 242 (1997), the Court found that trial counsel was ineffective in failing to raise a jurisdictional challenge. There, the defendant was charged and convicted of resisting and obstructing a peace officer. The officer in question was an off-duty motor vehicle carrier-enforcement officer. The Court of Appeals found that because of the limited powers of arrest given to such officers under the statute, they did not constitute peace officers under the resisting and obstructing statute. The Court (per Judge Corrigan) further found that there was no conceivable reason consistent with trial strategy for counsel to refuse to raise such an issue.. 558 NW2d at 244.

It is clear that *Jones v Barnes* was not intended to immunize all appellate errors from judicial oversight. Numerous federal courts have found counsel ineffective for

failing to raise appellate issues.[33] Defense counsel can point to no adverse effect in raising these issues on the original appeal. The issues complained of were both meritorious worked harmoniously with the issues raised in the original appeal. [sic] For these reasons, the standards for holding an evidentiary hearing have plainly been met.

* * *

RELIEF REQUESTED

WHEREFORE, Defendant prays this Honorable Court to grant the following Relief as required:

1. Require the prosecutor to answer this petition;

2. Order an evidentiary hearing, as required by *People v. Ginther,* 390 Mich 436; 212 NW 2.d 922 (1973), and by U.S. Supreme Court decisional law, and by the Sixth Amendment to the U.S. Constitution, where this Court hears evidence needed to grant relief:

   (A) Testimony from Mr. Griffin's expert that the drug courier profile is inapplicable;

   (B) Testimony showing why Mr. Griffin was denied his right to effective assistance of trial and appellate counsel;

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[33] *See United States v Cook,* 45 F3d 388, 394-95 (CA 10, 1995) ("an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a dead-bang winner, even though counsel may have presented strong but unsuccessful claims on appeal"); *United States v DeLaFuente,* 8 F3d 1333, 1336-37 (CA 9, 1993); *Ratliff v United States,* 999 F2d 1023, 1026 (CA 6, 1993) (counsel's failure to appeal erroneous restitution award was appellate ineffective assistance of counsel); *Freeman v Lane,* 962 F2d 1252, 1257-58 (CA 7, 1992) (counsel's failure to raise 5th Amendment claim on appeal despite ample precedent for claim was ineffective assistance rising to the level of "cause").

(C) Testimony from Glenn Evans after he is subpoenaed and can testify;

(D) Testimony from Defendant Griffin's police expert on drug courier profile testimony to show what testimony could be offered to rebut Trooper Coleman's drug courier profile testimony, and to use it in an exculpatory manner;

(E) Testimony from an expert attorney called by Defendant Robert Griffin to show why he was given ineffective assistance of counsel, and why the errors of his trial counsel were not strategic or hamless [sic];

3. After full consideration, grant Defendant relief from judgment and order a new trial where:

(A) Mr. Evans is granted immunity and is permitted to testify or at minimum where the prosecution is barred from arguing that the witness's invocation of his right [sic] remain silent should be applied against Mr. Griffin;

(B) Where Trooper Coleman is barred from offering drug courier profile testimony or at minimum where the jury is permitted to hear from defense experts who the drug courier profile was misapplied in this case. [sic]

4. Permit the filing of the attached brief;

5. Grant hearings or other relief the Court deems necessary and proper in the premises;

Respectfully submitted,

Dated: June 20, 2002

Patrick L. Rose – P43265
230 N Washington Sq Ste 306
Lansing, MI 48933-1312

STATE OF MICHIGAN

IN THE SUPREME COURT

_____/

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ROBERT LANELL GRIFFIN,

Defendant-Appellant.

_____/

New Mich. Sup. Ct. No. ___

Mich. COA No. 254433

Berrien Circuit
No. 98-403728
Hon. Thomas E. Nelson

Prior Michigan Court of Appeals
No. 216720

Prior Michigan Supreme Court
No. 117280

DELAYED APPLICATION FOR LEAVE TO APPEAL FROM COURT OF APPEALS ORDER (DATED AUGUST 20, 2004)*

(*NOTE: COURT OF APPEALS DENIED LEAVE TO APPEAL THE ORDER OF THE BERRIEN COUNTY CIRCUIT COURT DENYING DEFENDANT GRIFFIN'S MOTION FOR POST CONVICTION RELIEF BASED ON M.C.L. § 770.2 & MCR 6.500

(With Appendix in Support, Proof of Service and Filing Fee)

(Filed Oct. 15, 2004)

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DELAYED APPLICATION FOR LEAVE TO APPEAL FROM COURT OF APPEALS ORDER DENYING LEAVE TO APPEAL CIRCUIT COURT ORDER THAT DENIED A MOTION FOR POST-CONVICTION RELIEF FILED UNDER M.C.L. § 770.2, AND MCR 6.500

(With Appendix in Support, Proof of Service and Filing Fee)

STATEMENT OF JURISDICTION. This is an Application for Leave to Appeal seeking a grant of leave and an order reversing the decision by Judge Nelson denying the motion for relief from judgment. Mr. Griffin, as Defendant in this matter, filed a motion for relief from judgment. The prosecutor filed an answer. The Circuit Court issued a decision on March 21, 2003 denying the motion for relief from judgment seeking a new trial. Defendant's counsel filed a motion for reconsideration.[1] It was denied. The Defendant then filed his delayed application for leave to appeal of that decision within the one year period that is allowed, and the Court of Appeals denied that Application by an order entered on August 20, 2004. **(A cope of the Court of Appeals' 8-20-04 order is attached** after the signature page of this Application.)

[1] This motion was filed under MCR 6.504(B)(3), AND MCR 6.502(C), based upon MCR 2.114, AND MCR 2.119(F))

Mr. Griffin, by his counsel, has timely appealed that order within the 56 day period by filing this Application.

Defendant was originally convicted in. the Berrien County Circuit Court of possession with intent to deliver more than 225 (but less than 650) grams of cocaine. MCL 333.7401(2)(a)lii) [sic]; MSA 14.15(7401)(2)(ii). He was sentenced as a second offender to a sentence of twenty to sixty years incarceration. MCL 333.7413(2)(a)(ii); MSA 14.15(7413)(2). This case was presided over by the Hon. Thomas E. Nelson. At trial and at the original appellate level, the Defendant was represented by James D. Hill, 425 Westnedge, Kalamazoo, MI 49007. The undersigned was retained after the affirmance of the Defendant's conviction and represented him on rehearing in the Michigan Court of Appeals and on appeal to the Michigan Supreme Court, and in the Circuit Court on the motion filed under MCR 6.500, et. seq.

The Petitioner (Defendant Robert Griffin) has assembled and filed with the Circuit Court, and with this Court in an Appendix, copies of the pertinent documents from the Defendant's original appeal have been provided to this Court to this Court in the attached Appendix. These include the Defendant's Brief on Appeal to the Michigan Court of Appeals (App. 225a), the People's Brief (App. 254a), the decision on the merits (App. 285a), the rehearing pleadings (App. 289 et seq), and the pleadings filed in the Michigan Supreme Court (App. 314a).

There have been no federal habeas corpus actions or prior post-conviction proceedings in this matter. MCR 6.502(C)(9). Petitioner (Mr. Griffin) preserved these issues below. The undersigned requests post-conviction relief based for reasons set forth in the attached brief, and based

on the issues raised in the motion for relief from judgment as listed below. (See margin.)[3]

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[3] I. THE TRIAL COURT ERRED IN THE ADMISSION OF THE TESTIMONY OF GLEN EVANS' FIFTH AMENDMENT TESTIMONY AT TRIAL WHERE THE PROSECUTOR SOUGHT TO DRAW POSITIVE INFERENCES OF DEFENDANT'S GUILT FROM IT, ABSENT A GRANT OF IMMUNITY TO ALLOW DEFENDANT GRIFFIN TO CONFRONT HIS ACCUSER, AND WITHOUT A CAUTIONARY INSTRUCTION SINCE THAT VIOLATES HIS SIXTH AMENDMENT AND MICHIGAN CONSTITUTIONAL RIGHTS OF CONFRONTATION AND DUE PROCESS

II. THIS COURT SHOULD REVERSE BASED ON THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS ABOUT THE INFERENCES TO BE DRAWN FROM THE FIFTH AMENDMENT TESTIMONY OF GLENN EVANS, A POTENTIAL SUSPECT WHO MAY HAVE OWNED THE DRUGS, AND WHOSE SILENCE INCRIMINATED HIM.

III. THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF DRUG COURIER TESTIMONY BY TROOPER COLEMAN THAT LINKED MR. GRIFFIN TO THE DRUGS IN THE TRUNK THE LACK OF RELIABILITY IS CLEAR GIVEN THAT DRUG COURIER PROFILE ANALYSIS DOES NOT PROVIDE A RELIABLE BASIS TO LINK MR. GRIFFIN TO THE DRUGS BASED ON A MATCH BETWEEN HIS INNOCENT CONDUCT AND THE PROFILE, SO THAT ITS ADMISSION VIOLATES THE RULE IN PEOPLE V. HUBBARD, AND REQUIRES A NEW TRIAL, AND THE DEFENSE COUNSEL ERRED TO PRESENT EXPERT WITNESS TESTIMONY TO REBUT TROOPER COLEMAN'S UNRELIABLE LAY AND EXPERT OPINION TESTIMONY REGARDING THE ALLEGED LINK BETWEEN ROBERT GRIFFIN'S CONDUCT AND THAT OF A DRUG DEALER, AND IN FAILING TO SEEK A LIMITING INSTRUCTION AND IN FAILING TO OBJECT TO ADMISSION OF THE TESTIMONY BASED ON THOSE FACTS UNDER MRE 401, MRE 403, MRE 701, MRE 702 OR MRE 703 AND IN FAILING TO OBJECT TO THE ADMISSION OF EVIDENCE THAT THE DEFENDANT WAS ON PAROLE.

IV. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S DIRECTED VERDICT MOTION, AND THIS SAME COURT SHOULD GRANT A NEW TRIAL TO PREVENT A MISCARRIAGE OF JUSTICE, SINCE THE EVIDENCE WAS INSUFFICIENT AS A

(Continued on following page)

STATEMENT OF REASONS FOR DELAY IN FILING APPLICATION

Robert Griffin is indigent and has no money to pay the costs of the appeal. He relied on his family members to retain an attorney to represent him in the circuit court on the motion for relief from judgment. His family members had agreed to pay costs on appeal, including the $375 filing fee and appendix costs. They have only been able to retain the undersigned within the last few weeks, and have done so to insure that this Court can review the errors in Mr. Griffin's conviction. They have not been able to pay the costs of making eight (8) copies of the Appendix at Kinko's which would be substantial. Mr. Griffin requests that the Court of Appeals record be transferred to this Court, as is the normal practice. The Appendix filed in

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MATTER OF LAW TO PERMIT A RATIONAL TRIER OF FACT TO FIND EACH ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT.

V. THIS COURT SHOULD REVERSE BASED ON THE CUMULATIVE ERRORS COMMITTED AT TRIAL AND, THE FACT THAT NONE OF THE ERRORS CAN BE DEEMED TO BE HARMLESS

VI. DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN THESE ISSUES WERE NOT RAISED ON HIS INITIAL APPEAL.

VII. THE INTEREST OF JUSTICE STANDARDS OF MICH. COMP. L. § 770.1 AND 770.2 PERMIT THIS COURT TO GRANT A DELAYED MOTION FOR NEW TRIAL AT ANY TIME IN THE INTEREST OF JUSTICE AND THIS SUBSTANTIVE RIGHT CONTROLS IN THIS CASE OVER THE PROCEDURAL RULES CONTAINED IN MCR 6.500 *ET SEQ* LIMITING POST-CONVICTION TO CASES WHICH A CRIMINAL DEFENDANT CAN DEMONSTRATE CAUSE (OR ACTUAL INNOCENCE) AND ACTUAL PREJUDICE.

VIII. THE GOOD CAUSE REQUIREMENTS OF MCR 6.508(D)(3) SHOULD BE WAIVED BECAUSE THERE EXIST A SUBSTANTIAL POSSIBILITY THAT THE DEFENDANT IS INNOCENT.

the Court of Appeals is numbered by pages and has the contents of the trial court record. Mr. Griffin has submitted a request to the Court of Appeals to transfer the record to this Court to allow it to be reviewed as this Court decides whether to grant this Delayed Application for Leave to Appeal. If the Court of Appeals does not timely transfer the Appendix, then Mr. Griffin asks the Court to review the one copy of the Appendix that he has filed with this Application, and/or allow him to supplement with additional copies.

Mr. Griffin's family members were not able to raise the money to pay these costs until near the deadline for filing this Delayed Application for Leave to Appeal. This is the reason why there has been a delay in filing the appeal. The undersigned had no obligation to pay these costs, and no obligation to go forward with this appeal absent payment of such costs. This is good cause to justify the delay. The Court has not generally waived the filing fees in cases involving post judgment relief. The motion to waive the filing fees would have required more money to be expended by the family than to wait and raise the money to pay the costs. The Court has no procedure for paying to copy the appendix. So the motion to waive filing fees would not have solved the problem. The Application is within a year.

* * *

IV. LEGAL ARGUMENT #III: THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF DRUG COURIER TESTIMONY BY TROOPER COLEMAN THAT LINKED MR. GRIFFIN TO THE DRUGS IN THE TRUNK THE LACK OF RELIABILITY IS CLEAR GIVEN THAT. DRUG COURIER PROFILE ANALYSIS DOES NOT PROVIDE A RELIABLE BASIS TO LINK MR. GRIFFIN TO THE DRUGS BASED ON A MATCH BETWEEN HIS INNOCENT CONDUCT AND THE PROFILE, SO THAT ITS ADMISSION VIOLATES THE RULE IN *PEOPLE V. HUBBARD*, AND REQUIRES A NEW TRIAL, AND THE DEFENSE COUNSEL ERRED TO PRESENT EXPERT WITNESS TESTIMONY TO REBUT TROOPER COLEMAN'S UNRELIABLE LAY AND EXPERT OPINION TESTIMONY REGARDING THE ALLEGED LINK BETWEEN ROBERT GRIFFIN'S CONDUCT AND THAT OF A DRUG DEALER, AND IN FAILING TO SEEK A LIMITING INSTRUCTION AND IN FAILING TO OBJECT TO ADMISSION OF THE TESTIMONY BASED ON THOSE PACTS UNDER MRE 401, MRE 403, MRE 701, MRE 702 OR MRE 703 AND IN FAILING TO OBJECT TO THE ADMISSION OF EVIDENCE THAT THE DEFENDANT WAS ON PAROLE. 29

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* * *

LEGAL ARGUMENT #VII: THE INTEREST OF JUSTICE STANDARDS OF MICH. COMP. L § 770.1 AND 770.2 PERMIT THIS COURT TO GRANT A DELAYED MOTION FOR NEW TRIAL AT ANY TIME IN THE INTEREST OF JUSTICE AND THIS SUBSTANTIVE RIGHT CONTROLS IN THIS CASE OVER THE PROCEDURAL RULES CONTAINED IN MCR 6.500 *ET SEQ* LIMITING POST-CONVICTION TO CASES WHICH A CRIMINAL DEFENDANT CAN

DEMONSTRATE CAUSE (OR ACTUAL INNOCENCE) AND ACTUAL PREJUDICE.

LEGAL ARGUMENT #VIII: THE GOOD CAUSE REQUIREMENTS OF MCR 6.508(D)(3) SHOULD BE WAIVED BECAUSE THERE EXIST A SUBSTANTIAL POSSIBILITY THAT THE DEFENDANT IS INNOCENT

SUMMARY OF ARGUMENT. Mr. Griffin asks that this Court remand this case for a new trial to correct serious errors that led to his conviction. It would be a serious miscarriage of justice to allow this man to serve this much time for drugs in the trunk. If he had been able to exclude the erroneous drug courier profile evidence, he would have had a fair trial. If he could compel testimony of his cousin, Glenn Evans, then a fair trial would be his because he could show a jury that another person had put the drugs in the trunk without his knowledge. The defendant's cousin had put his clothes and other belongings with the drugs in the trunk.

At the very least, Mr. Griffin should have been able to prevent the prosecutor from making the error worse by his closing arguments. The prosecutor gave a closing argument suggesting that Glenn Evans conspired with Robert Griffin to claim the Fifth Amendment to make himself look guilty as some kind of ploy. The prosecutor's suggestion was that Glenn Evans was simply trying to help Robert Griffin by making himself look guilty in order to cause a jury to acquit Griffin. This closing argument magnified the error of allowing Evans to testify in the first place without a grant of immunity to compel him to testify fully about his own guilt. The prosecutor magnified the

court's error in allowing Evans to invoke the Fifth Amendment.

The prosecutor's argument suggested that it was Robert Griffin's fault that Glenn Evans was hiding the truth of who really owned the drugs by invoking the Fifth Amendment. The prosecutor blamed Mr. Griffin for Evans taking the Fifth Amendment and being unable to testify, and this argument should have caused an immediate mistrial. This Court should grant a new trial on that basis alone. In combination, the errors at trial taken one by one or together cannot be seen as harmless. The errors demand a new trial.

If the purpose of a trial is to find the truth, then the introduction of the drug courier profile testimony to tie Mr. Griffin to drugs in the trunk, and the process of how Evans testified without being able to be asked if he put the drugs (with his clothes) in the trunk was a travesty leading to hiding the truth. The drug courier profile testimony as used was no more than superstition or voodoo. This is how witches were convicted in Massachusetts. Our Supreme Court outlawed the procedure. This is not a witch hunt. If this Court thinks Mr. Griffin could be convicted at a *fair* trial, it should order one and find out if he would.

The conviction of a defendant in an unfair trial like this one gives no basis or confidence in a just verdict.

STATEMENT OF FACTS

A. Procedural History Robert Griffin was convicted by a jury of possession with intent to deliver greater than 225 but less than 650 grams of cocaine as a second

offender, M.C.L. § 333.7401(2)(a)(ii), M.C.L. § 333.7413(2). He was sentenced to a term of twenty (20) to sixty (60) years. His appeals to the Michigan Court of Appeals and Michigan Supreme Court were denied. The undersigned was counsel to Mr. Griffin in the Supreme Court only – having been retained after the Court of Appeals heard an appeal filed by his former trial counsel and denied it. The Michigan Supreme Court denied leave to appeal on March 28, 2001 and the motion for rehearing on June 26, 2002,

B. The Trial. Richard Griffin was stopped on I-94 in Lincoln Township (Berrien County) by Officer James Coleman who was working a one-person radar unit on the freeway. (See Prosecutor's Opening Statement, Transcript, p. 96-97, App 81a-82a; Trooper Coleman's Trial Testimony, Transcript, page 96-97, App. 82a). At the time that he made the stop, Coleman testified that Mr. Griffin was driving 78 miles an hour down the freeway (See Prosecutors Opening Statement, Transcript, 88, App. 74-74; Trooper Coleman's Testimony at page 97, App. 82a). Mr. Griffin was alone in a 1995 Olds Aurora and freely pulled over in response to officer's signal(See Trooper Coleman's Testimony at page 97, App. 82a).

Mr. Griffin presented a valid Illinois driver's license, but didn't have paperwork for the car (Coleman at 98, App. 83a). The car was registered to a "Patricia Taylor" in Illinois. The Officer testified that Mr. Griffin stated that Patricia Taylor was his aunt and that only Mr. Griffin and his aunt drove the vehicle (Coleman at 128, 142, App. 100a, 114a). The police refused to admit at trial that he knew that Glenn Evans drove the car were futile (Coleman at 153, App. 128a). During the officer's initial encounter with Robert Griffin, the officer saw the top of a zip lock baggie in the center counsel of the car when Mr. Griffin

was hunting for the registration. When the officer asked Mr. Griffin what the baggie was, Mr. Griffin showed the bag to the officer which contained some candies. Mr. Griffin stated to the officer that "he didn't play that way," (Coleman at 103, App 88a). No objection was interposed to this question, but the trial court barred the officer from offering his spin on what the statement meant, Id.

The officer took the information back to his car and ran it through the LEIN system. The LEIN system stated that Robert Griffin's Michigan driver's license was suspended for a poor driving record(Coleman at 100, App. 85a).[3] Officer Coleman testified that Mr. Griffin had an OCA number assigned to him. An OCA number is a tracking number indicating that another police agency was tracking the individual's traffic stops; *Id.* There was no objection to this question. The Officer testified that Robert Griffin's drivers license while valid in Illinois, was not valid in Michigan (Coleman at 101, App. 86a) On cross-examination, the officer testified that all the points had dropped off and that Mr. Griffin could have his Michigan license reinstated for a simple payment of a reinstatement fee (Coleman at 142). At that time, the Officer made a decision to arrest Robert Griffin, executed a pat down incident to the arrest and found a pager together with an address book (Coleman at 101, App. 86a).

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[3] This was significant because an individual arrested for driving on a suspended license is guilty of a civil infraction and cannot be arrested. The officer testified that an exception exists for an out-of-stater where the officer has the discretion to take the individual to station to post a bond (Coleman at 143, App. 115a).

During the course of the Officer's inspection of the car, the officer noted that the car was registered in the name of a third person, Mr. Griffin had a beeper and a pager,[4] that the car had an unusual amount of air fresheners tied together by the emergency brake, and that Mr. Griffin had a business card with odd notes on the back of it (Pros Opening 90, App. 75a; Coleman at 104; App. 89a).

Over defense objection, the officer was permitted to testify that in his experience, numerous air fresheners were associated with drug dealers (Coleman at 105; App. 90a). Defense counsel made extensive arguments why this drug courier profile testimony should not be allowed. The defense was given a continuing objection to this line of testimony, Id at 117. At various points, the prosecution attempted to suggest that the air fresheners were placed in a suspicious place, but on cross-examination, the officer admitted that they could not legally be dangling from the mirror (Coleman at 154, App. 126a). Officer Coleman testified that he didn't know how old the fresheners were, what their life span was, or whether they even still worked, *Id.* On cross-examination, the officer also admitted that people rarely look in the trunks of cars that they borrow (Coleman at 158, App. 98a).

The officer also testified at length that it was suspicious to have cell phones and pagers, id. (It is important to note that Trooper Coleman never attempted to use the cell phone and could not determine whether it had roaming

[4] The officer later testified that in his opinion, cell phones and pagers were indicative of drug dealers. The officer later admitted that most people in Chicago had both cell phones and pagers. (Coleman at 150, 158, App. 122a-130a).

capabilities in Michigan).[5] $301 was also found, but he was inconsistent about whether the money was found in the passenger compartment of the car or on Robert Griffin's person.

The officer also testified that Mr. Griffin told him that he worked at Ticketmaster in Chicago, but had a business card for an individual who worked at "Ticket Quest" in Indiana (Coleman 149, App. 121a).[6] On the back of the card were a series of names and numbers running from 420 through 3000, Id. At 126. Over defense objection, the officer was permitted to testify that he believed that it was amounts of money, Id. The business card was found in Robert Griffin's address book.

Mr. Griffin told the Officer he had the wrong man and that he never lived in Michigan, didn't have a Michigan license, and that he was not on parole (Coleman at 138, App. 110a). These statements were made when the officer told him about the suspended driver's license record for a Richard Griffin from Kalamazoo (with his date of birth) who was on parole (*Id.*; Pros Opening at 91, App. 76a). The officer decided to detain Mr. Griffin and called for a "drug dog" which alerted positively to the car (Coleman at 131).

Utilizing the statements by Griffin, the officer opened the car trunk, found a shopping bag by the left wheel well which was tied shut. He opened the bag and another bag

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[5] This is not as unusual as it might seem. Prepaid cell phones often roam on different networks and some cellular networks do not operate out of their home areas. *See, e.g.* http://www.cricketcommunications.com/faqs.asp#2.

[6] Glenn Evans testified that the card was his (Evans at 194).

and found cocaine. (Coleman at 131, App. 103a).[7] Mr. Griffin was arrested and charged with the instant offense. No fingerprints could be lifted from the bag. The prosecution and police explained that this was due to the fact that several police officers handled the drugs with their bare hands (Pros Opening at 92, App. 77a; Coleman at 139, App. 111a). Police also found an Atlanta Braves jacket and some tennis shoes (later determined to actually be work shoes) in the trunk of the car (Coleman at 134, 146). The officer testified they hooked like they would fit Robert Griffin, Id.[8] They found car cleaning type equipment in the trunk (Coleman at 135, App. 107a).

While Mr. Griffin was in custody, his pager continuously went off in the police property room and the police went and played the numbers out of the beeper. These numbers corresponded to different numbers in the Kalamazoo area (Coleman at 123, App. 95a). The police never called these numbers to investigate who was calling. The prosecutor juxtaposed these multiple numbers of unknown origin with Robert Griffin's explanation that he was in Kalamazoo to pick up his child for the weekend. *Id.* Defense counsel did not object to this argument or make any argument about the police failure to investigate about the unknown origin of the calls. Defense counsel also did not call any family members to testify about Mr. Griffins' family and acquaintances (in the Kalamazoo area) who

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[7] Note that the prosecutor during his opening statements incorrectly referred to the bag as a duffle bag (Pros Opening at 91, App. 76a)

[8] The Glenn Evans testified that the clothing was his. He also testified to a number of innocent items in the car that the officer did not mention and testified that there were miscellaneous cards in the car (TT 193, App. 147a).

called Mr. Griffin. The officer denied stating at the police station that he told someone over the phone that he was unsure whether to charge Mr. Griffin or Mr. Evans with the offense (Coleman at 144, App, 116a).

A prosecution expert witness testified at trial regarding the street value of the drugs and that anyone who has that much cocaine, intends to sell it. (Lang 163). The value was $10,000 wholesale; $20,000-$30,000 retail (Lang at 172). The prosecutor then tried admitted evidence (over objection) that larger dealers carry pagers and cell phones, This line of questioning was shut down by the judge, but after the jury heard the answer, Id. At 172-173. It should be noted that at TT 179-184 (App. 133a-138a) there was discussion of lost testimony where the parties stipulated outside the presence of the jury what the testimony was, Id.

The other likely suspect in the case was Glenn Evans. Mr. Evans was Robert Griffin's cousin and was unemployed at the time (Evans at 186, 197, App. 140a, 151a). He lived with his mother Patricia Taylor and his stepfather, Id. Mr. Evans testified that the Aurora belonged to him even though it was titled in his mother's name (Evans at 187, 190, App. 141a, 144a). Mr. Evans testified to loaning the car to Mr. Griffin on the day in question so that Mr. Griffin could drive to Kalamazoo to visit with his son, Id. The witness plead the Fifth Amendment when questioned about ownership of the bag (Evans at 186, 205, App. 140a, 159a). Ultimately, Mr. Griffin was convicted as charged and appealed of right (App. 221a).

C. The Appeal. In the Defendant's brief on appeal to the Michigan Court of Appeals, his trial attorney raised one issue challenging the admission of drug courier profile,

(App. 225a). On February 25, 2000, the Court of Appeals affirmed the Defendant's conviction in an unpublished opinion (App 309a). Up to this time, the Defendant was represented by Mr. Hill. Following the Defendant's conviction in the Michigan Court of Appeals, he retained the undersigned as his appellate counsel. Counsel timely moved for rehearing in the Court of Appeals. Rehearing was denied on May 24, 2000. Defendant's timely application for leave to appeal was denied by the Michigan Supreme Court, along with his motion for rehearing (App. 314a). This petition set forth grounds for granting relief, including a new trial.

* * *

> properly used only as background or modus operandi evidence and should not be used as substantive evidence of guilt.
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> [Guideline #4:] Fourth, the expert witness should not be permitted to express an opinion that, on the basis of the profile, defendant is guilty, and should not expressly compare the defendants characteristics to the profile in a way that implies that the defendant is guilty. *Williams, supra,* 240 Mich at 320-21, citing *Murray,* supra, 234 Mich. App. at 56-57.

The Court should grant a new trial to remedy the error in admitting Trooper Coleman's testimony in violation of these guidelines from *People v. Murray,* The guidelines are not consistent with *Hubbard's* analysis of the drug courier profile. A better set of guidelines from a law review article cited in *Hubbard* should be substituted.

In applying the *Murray* guidelines properly, the Court in *People v. Charles E. Williams* found that the trial judge

in that case had violated *Murray* "guideline #4" by allowing the introduction of evidence linking the defendants conduct to the traits found by an expert to match the drug profile. But the *Williams* Court then explained that the error was harmless given the overwhelming evidence of the defendant's guilt in that case. See *Williams*, supra, 240 Mich App at 321-22. But the proofs in *Williams* were far stronger than the facts that link Mr. Griffin to the much smaller quantity of drugs found in the trunk of the car in this case. This Court should apply *Murray* and *Hubbard* to find error requiring reversal.

C. Defendant's Counsel Rendered Ineffective Assistance of Counsel in Failing to Present Expert Witness Testimony to Rebut Trooper Coleman's Unreliable Lay and Expert Opinion Testimony Regarding the Alleged Link Between Robert Griffin's Conduct and That of a Drug Dealer, in Failing to Seek a Limiting Instruction and in Failing to Object to Admission of the Testimony Based on Those Facts under MRE 401, MRE 403, MRE 701, MRE 702 or MRE 703, and in Permitting the Prosecution to Introduce Evidence of Mr. Griffin's Parole Status Under the Guise of Admitting False Statements from the Accused.

Defense counsel did not impeach Trooper Coleman during trial based on the lack of reliability of his testimony purporting to link Robert Griffin to the drugs in the trunk. Defense counsel did not retain an expert to show that there is no provable link to be made on the basis of any lay or expert analysis showing why Griffin's innocent traits of conduct reliably showed he was a drug dealer. This expert

opinion would have shown why the testimony of Trooper Coleman seeking to link Griffin's innocent traits of conduct to the drugs in the trunk was wholly irrelevant to any material issue, and hence inadmissible under MRE 401, The expert opinion would also have shown that the unreliability of this testimony creates an obvious and serious risk that a jury would overvalue its probative significance in establishing guilt, so as to make its admission more prejudicial than probative, and inadmissible under MRE 403. The expert could show that the factual foundation that was available to Trooper Coleman did not support the use of the drug courier profile here, making the testimony inadmissible under MRE 703.

Another way to state the issue is that the expert opinion was more prejudicial than probative under MRE 703 given that there is no reliable way to establish that the innocent traits of conduct here (i.e. possession of cell phone, pager and air freshener and address book) does not link one to being a drug dealer. The link is not strong enough to give it the credence of expert knowledge. It also is not a fact that can be established by the lay testimony of a police officer since it is rank speculation. There is no adequate type of knowledge that a state trooper could accumulate to give this testimony on these facts to show that Robert Griffin was a drug dealer.

The defense lawyer's failure to impeach Trooper Coleman was ineffective assistance of counsel as well. The defense counsel should have used each of the points raised by the expert on the unreliability of drug courier profile testimony both to impeach the officer, to seek a limiting instruction and to seek to exclude this testimony from trial, as well as to seek a more reliable factual foundation from the witness and a cautionary instruction.

The impeachment that Mr. Griffin's defense counsel engaged in was simply not probative of these key points. It was essential to cross-examine Trooper Coleman about the inherent unreliability of his drug courier profile testimony to insure that a jury would discredit his analysis. While defense counsel did ask Trooper Coleman whether most people in Chicago carried cell phones and pagers, he never showed the jury why the drug courier profile was flawed. It is so flawed, unreliable and unprovable a jury can conclude it must be disregarded.

Defendant Griffin is attaching to this Motion, an offer of proof which shows that the drug courier profile was misapplied in this case. It was improper drug courier profile testimony because the police officer's opinion was nothing more than an ad hoc marshaling of innocent factors by the officer without regard to numerous factors that show a drug courier but which were not factors present here.

Further, the factors which were present were the factors which have the lowest probability of return because they are shared by such a large portion of the innocent public. It was error in this case to allow the officer to focus blindly on certain ambiguous factors while ignoring the absence of numerous other factors. Not only is defendant prepared to show through the testimony of a former narcotics trafficker that the Defendant did not meet the drug courier profile, but also that the evidence in this case was perfectly consistent with all the factors which suggest that the Defendant was a blind mule.

Counsel also failed to object to the officers interjection that the Defendant was on parole. Under Michigan law, evidence of a sentence is inadmissible. *People v Rapphon*

(after remand), 86 Mich App 17, 238 NW2d 400 (1975). The fact that the prosecution "back doored" this evidence in under the guise of claiming that the Defendant lied about his past does not obviate the highly prejudicial nature of this testimony. It made the jury infer that the Defendant was a bad person and would be more likely to know that he was carrying illegal substances. *Old Chief v United States*, 519 US 172, 117 S Ct 644; 136 L Ed 2d 574 (1997). Any issue with respect to the Defendant lying to the police could easily have been addressed by simply indicating that the Defendant falsely claimed to have never lived in the State of Michigan or to have had a suspended driver's license. *Cf United States v Span*, 75 F3d 1383, 1387 (CA 9, 1996).

Counsel's failure to investigate and call a defense expert to negate the existence of the profile factors and to object to this highly prejudicial material constituted ineffective assistance of counsel.[20] Counsel's failures permitted the state to marshal a series of innocent acts together to try to create an inference that criminal conduct is occurring when the acts are not even necessarily suspicious.

Defense counsel breached his duty to impeach prosecution witnesses because that testimony was damaging to the defense and there exists a legitimate basis to do so. Defense counsel should have used impeachment questions showing the flaws in the trooper's profile and then presented expert testimony of his own to show that the profile testimony was unreliable, and misleading.

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[20] *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 LEd2d 674 (1684); *Evitts v Lucey*, 469 US 387, 105 S Ct 830, 83 L Ed 2d 821 (1985); *People v Wolfe*, 156 Mich App 225, 401 NW2d 283 (1986).

Further, portions of the drug courier profile actually demonstrate Mr. Griffin's innocence and make it more likely that he was an innocent citizen who was tricked into unwittingly carrying the drugs to Kalamazoo. Defense counsel could have shown the conduct was innocent, as well, by showing that the police did not investigate the origin of the cell phone calls, or investigate Robert Griffin's family and acquaintances who would show that he was (in the Kalamazoo area) to visit his son.

While the prosecution will surely try to label the defense counsel's failures in this regard as "trial strategy," it is well settled that; "'The label of "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.'" *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (CA 8, 1984).

In *Nixon v Newsome*, 888 F2d 112 (CA 11, 1989), the Court found that "it had no difficulty concluding that the attorney's actions were not within the wide range of professional competence" where counsel had failed to impeach the witness with prior inconsistent testimony. The Court found that because the witness's testimony was crucial, "professionally competent counsel would have had at hand the transcript or the relevant excerpts and would have been sufficiently prepared to locate her relevant testimony." *Id* at 116-117.

Under these circumstances, this case would then fall within the same situation as Nixon where the court could "perceive no excuse for the failure to impeach." the witness with the damning evidence. *See also Smith v Wainwright*, 741 F2d 1248 (CA 11, 1984) (remanding for an evidentiary hearing on whether counsel was ineffective in failing to impeach prosecution witness); *Moffett v Kolb*, 930 F2d

1156 (CA 7, 1991) (finding ineffective assistance of counsel where the defense attorney where counsel failed to impeach prosecution witness with prior inconsistent statements).

In deciding this issue, Mr. Griffin also asks this Court to consider *State v Simpson,* 946 P2d 890 (Alaska Ct App, 1997). There, the Defendant was charged with sexually molesting a child. The *Simpson* Court found that counsel was ineffective where he ignored "a veritable gold mine of information which would have impeached the testimony of the minor witness who testified that defendant sexually assaulted him." While the Alaska Court recognizes that genuine strategic decisions of counsel do not constitute ineffective assistance of counsel, the Court found that "no reasonably competent attorney would have overlooked the value of this testimony. Counsel did not strategize here in failing to impeach Trooper Coleman on his failure to call an expert.

Defendant concedes that normally the decision whether to call an expert witness is a strategic decision left to trial counsel. *People v. LeBlanc,* 465 Mich. 575, 640 N.W.2d 246 (2002). An evidentiary hearing is required to develop claims of ineffective assistance of trial counsel. People v. Darden, 230 Mich.App 597, 604; 585 NW2d 27 (1998). Defendant believes that in an evidentiary hearing he can demonstrate counsel failed to consider or investigate use of an expert witness to challenge this assertion.

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error was determinative." See *people v. Lukity,* 460 Mich 484, 596 NW2d 607 (1999). The prosecutor cannot meet the standard to show the lack of harmful constitutional error, and the defense easily meets the standard for

showing non-constitutional error, particularly given its cumulative nature,

The cumulative errors are set forth below. First, the failure to strike his testimony and instruct the jury to disregard it or to draw adverse inferences from his Fifth Amendment invocation meant the jury was being asked to accept as true a partial story. Second, the prosecutor then was allowed to argue that Evans' Fifth Amendment assertion shows he was trying to help Robert Griffin. This statement was made by the prosecutor without telling them about drawing adverse inferences. It mislead them into thinking the partial testimony was all that could be considered, and that the lack of additional testimony from Evans was the fault of the defendant. Third, the prosecutor was permitted to introduce a redacted and ad hoc drug courier profile to the jury in order to make it seem like this Defendant was a knowing courier. Fourth, counsel failed to present expert testimony to rebut this testimony or to even adequately impeach this testimony. This combination of errors should erode this Court's confidence in the integrity of the outcome. A new trial must be ordered and a mistrial should have been declared at trial.

VI. DEFENDANT WAS DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN VALID ISSUES WERE WAIVED IN HIS FIRST APPEAL.

As was demonstrated in the prior issues, counsel mysteriously jettisoned meritorious issues for no discernable reason. As has been demonstrated, the issues were exceptionally strong and most likely would have prevailed on appeal. Counsel's failure to present these issues constituted ineffective assistance of counsel *Evitts v Lucey,* 469

US 387, 105 S Ct 530, 83 L Ed 2d 821 (1985); US Const Am VI.

In *Kimmelman v Morrison*, 477 US 365, 106 S Ct 2574, 91 LEd 2d 305 (1986), the United States Supreme Court found that failure of an attorney to pursue a Fourth Amendment violation claim on appeal could be reviewed in federal habeas corpus proceedings, *even though federal courts will normally refuse to*

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case, where a constitutional violation has resulted in the conviction of one who is actually innocent."[41] Actual innocence includes "of the sentence imposed." *Jones v Arkansas*, 929 F2d 375, 381 (CA 8, 1991).

This evidence casts grave doubts on the case against the Defendant and truly suggests the possibility that an individual who is actually innocent was convicted of the crime.

RELIEF REQUESTED **WHEREFORE,** Defendant asks this Court to grant the following relief:

(1) **GRANT LEAVE TO APPEAL** and **REMAND THE CASE FOR A NEW TRIAL**. or,

(2) *As the first alternative request for relief,* **ORDER THAT THE PROSECUTOR ANSWER THIS DELAYED APPLICATION**, if they have not done so, and then **REMAND THIS CASE** for an evidentiary hearing, as required by *People v. Ginther*, 390 Mich 436; 212 NW

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[41] *Murray v Carrier, supra.* at 495-496; *Duggar v Adams*, 489 US 401, 410-412, n6, 109 S Ct 1211, 103 L Ed 2d 435 (1989); *Coleman v Thompson*, 501 US 722, 111 S Ct 2546, 115 L Ed 2d 640, 669 (1991).

2.d 922 (1973), and by U.S. Supreme Court decisional law, and by the Sixth Amendment to the U.S. Constitution, and then **GRANT LEAVE TO APPEAL** to decide if a new trial should be ordered AND order a new trial.[a]

Respectfully submitted

/s/ Patrick L. Rose

Dated: October 15, 2004

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[a] The Court should specify in its new trial order that:

(A) At a new trial, testimony from a prosecution expert on the drug courier profile cannot be admitted;

(B) At a new trial, bar the prosecution from obtaining the testimony of Glenn Evans *unless* he is granted immunity and compelled to testify (and this is just given that to this day Evans has not been prosecuted);

(C) At a new trial, bar the prosecution from making any arguments that Evans' invocation of his right remain silent should be applied against Mr. Griffin;

D) At a new trial, bar Trooper Coleman from offering drug courier profile testimony or at minimum where the jury is permitted to hear from defense experts who the drug courier profile was misapplied in this case.